United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

339

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,166 and 71-1151
Crim. No. 1192-68

UNITED STATES OF AMERICA, Appellee

v.

FRANKLIN D. SHEPPARD, JR., Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Rainer K. Kraus
George Y. Wheeler

1000 Vermont Avenue, N.W.
Washington, D.C. 20005

Counsel for Appellant
(Appointed by this Court)

February 4, 1972

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee	)	Case Nos. 23,166 and 71-1151
	)	Crim. No. 1192-68
v.	)	
	)	
FRANKLIN D. SHEPPARD, JR.,	)	
	)	
Appellant	)	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Franklin D. Sheppard, Jr., appellant in the above-captioned cases, hereby petitions, by his attorneys, for rehearing of the decision and judgment of this Court dated January 14, 1972, to the extent that the Court declined to reverse the appellant's conviction of kidnaping where it is clear that no evidence of purpose or motive for the offense was ever presented to the jury, and where the jury was erroneously instructed about the elements of the offense of kidnaping. Because this Court's decision with regard to the elements of the offense of kidnaping is in conflict with the decision of a different panel of this Court in United States v. Wolford, ____ U.S. App. D. C. ____, 444 F. 2d 876 (1971), we suggest that rehearing en banc is necessary in order to secure or maintain uniformity of the Court's decisions.

This petition is filed pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

Grounds for Rehearing

Appellant respectfully submits that this Court misapprehended or overlooked points of law and fact in holding that the Trial Court's instructions to the jury concerning the element of motivation or purpose in the offense of kidnaping was proper.

Relevant Facts and This Court's Decision

The appellant was tried and convicted of kidnaping and assault with a dangerous weapon. On appeal, the appellant contended that his conviction for kidnaping should be reversed because the prosecution had failed to submit any evidence of the motivation or purpose of the offense and because the Trial Court had delivered erroneous jury instructions concerning the charge of kidnaping. (Brief of Appellant, pp. 12-17)

As discussed in the appellant's original brief (pp. 16-17), the Trial Court's instructions to the jury as shown in the official transcript of the proceeding were:

> "Kidnaping need not be necessarily be for ransom, reward or other pecuniary reason or any reason whatsoever." (STr. 79; emphasis supplied)

In effect, the jury was advised that the purpose of the abduction was of no consequence and that it could totally disregard this aspect of the prosecution's burden.

In response to these matters, the Government first filed a "Motion to Correct Record" in the District Court, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure. It requested that the supplemental transcript of Mr. Sheppard's trial, containing the instructions to the jury be changed in part to read as follows:

> "Kidnaping need not necessarily be for ransom, reward or other pecuniary benefits, but may be for any reason whatsoever."

The Government's version of the instructions required the deletion of three words and the substitution of five new words, and the meaning of the instructions was completely changed. Instead of language indicating that no purpose for the offense need be found, the jury, according to the Government's version of the instructions, had been requested to make such a finding.

The reason suggested by the Government for the requested change in the official transcript of the instructions appears in its "Motion for Extension of Time in Which to File Appellee's Brief" of June 16, 1970:

> "This [alleged transcription] error <u>is a material one which would substantially affect the disposition of this appeal if it remains uncorrected</u> . . ." (p. 1, emphasis supplied.)

This conclusion by the Government was reached in tacit if not explicit agreement with appellant's position that these instructions, if delivered as reported, constituted reversible error.

On February 5, 1971, Judge John H. Pratt, who was the trial judge below, (Findings, para. 1), issued his "Findings, Conclusions, and Order" modifying the official transcript of the instructions to the jury precisely as the Government had requested. Just as the Government had done, Judge Pratt emphasized that the language in question ". . . was a key instruction as to the elements of the charge of kidnaping" (Findings, para. 3). He further held that it had occupied a ". . . central position . . . in the trial." (Conclusions, para. 1)

Judge Pratt based his conclusion that the record should be revised in part upon the fact that his prepared jury instructions in this case, at least a portion of which were still preserved in his files, reflected his original intention to deliver the jury instructions in the form proposed in the Government's motion. (Findings, para. 4)

Appellant promptly thereafter filed a separate appeal from the District Court's "Findings, Conclusions, and Order" of February 5, 1971, modifying the record.

On March 22, 1971, subsequent to the docketing of this separate appeal, the Government filed its brief in the original docket. In that brief, the Government stated that ". . . the record is devoid of any

evidence whatsoever relating to [the] motive [of the kidnaping], as the appellant himself points out . . . ." (p. 10) Thus, appellant and the Government were then and continue to be in apparent agreement on this point.

The decision of this Court on January 14 specifically rejected appellant's contention that the Trial Court had erred in instructing the jury concerning the kidnaping charge. This Court stated:

> ". . . The correction changed the trial court's instruction on the necessity of proof of the abductor's purpose from one which appellant claimed was erroneous to one which he conceded was proper. Since we think the uncorrected instruction was proper, any error in granting the Government's motion would be harmless."
> (Opinion, p. 2, fn. 1; emphasis supplied)

This Court went on to affirm both the convictions of the appellant and the decision of the District Court granting the Government's motion to correct the record.

Argument

In its opinion, this Court specifically held that the following jury instruction was "proper" (Opinion, p. 2, fn. 1):

> "Kidnaping need not be necessarily be for ransom, reward or other pecuniary reason or any reason whatsoever." (STr. 79; emphasis supplied)

This holding, made without reference to authority, is in direct conflict with the legislative history of the Federal kidnaping statute and relevant case authority.

A different panel of this Court made a detailed analysis of the legislative history of the Federal kidnaping statute and relevant case authorities in United States v. Wolford, ____ U.S. App. D.C. ____, 444 F. 2d 876 (1971). In that case, the appellants contended that the seizure and detention of the victims of an armed robbery did not constitute an independent act of kidnaping.

In reviewing the elements of the offense to determine whether the facts of that case were comprehended within the District of Columbia kidnaping statute,[1/] the Court concluded:

> "Under the Federal Kidnaping Act, it is thus settled that 'involuntariness of seizure and detention . . . is the very essence of kidnaping,' Chatwin v. United States, 326 U.S. 455, 464 (1946), and under Gooch [2/] and Healy [3/] that the motive behind the kidnaping is unimportant, so long as the act was 'done with the expectation of benefit to the transgressor,' 297 U.S. at 128. The Third Circuit has gone so far as to state:

1/ While the appellants in Wolford had been charged under a District of Columbia kidnaping statute, the Court relied upon case decisions construing the meaning and application of the Federal Kidnaping Act to develop its analysis of the facts in that case.

2/ United States v. Gooch, 297 U.S. 124 (1936).

3/ United States v. Healy, 376 U.S. 75 (1964).

> 'We think that Congress by the phrase 'or otherwise' intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to himself to induce him to undertake it.'
>
> United States v. Parker, supra., 103 F. 2d at 861." (Id. at 881; emphasis supplied)

Thus, the Court indicated that while the specific purpose or motive for a kidnaping has no special significance, the prosecution has the burden of showing that a kidnaping was "done with the expectation of benefit to the transgressor."

Applying its analysis to the facts in Wolford, the Court demonstrated conclusively that evidence of the purpose of the kidnaping was essential to its determination that the standard of Gooch and Healy had been met. As stated by the Court:

> "Thus there can be no doubt that the facts of the present case are within the literal language of section 22-2101 [The District of Columbia kidnaping statute]. Wilson was detained and transported against his will to a different locale, several miles away, and the purpose of the detention -- to facilitate the success of the hijacking -- was to secure a benefit to appellants." (Id. at 881; emphasis supplied)

It seems self-evident here that the appellant's conviction could not possibly satisfy the standard of Gooch and Healy. The jury instructions by the Trial Court that a "[k]idnaping need not . . . necessarily be for . . . any reason whatsoever," was an invitation to disregard all grounds for a determination of "benefit" to the appellant.

Particularly where the Government agrees, as here, that there is no evidence in the record to establish any motive for the offense (Brief for Appellee, p. 10), that determination on the facts would have been impossible.

A review of the case decisions of other appellate courts confirms that no other circuit has ever sustained a conviction under the Federal kidnaping statute in the total absence of evidence about the purpose of the offense and of appropriate consideration of that evidence by the trier of fact. Even in Gawne v. United States, 409 F. 2d 1399 (9th Cir., 1969), cert. denied, 397, 943 (1970), which the Government claims is dispositive, the indictment, the instructions and the record of trial reveal the purpose of the kidnaping offense was there thoroughly considered. Indeed, that opinion reveals that the jury which convicted the defendants had been instructed that conviction would lie only if the purpose of the kidnaping was established beyond a reasonable doubt. (Id. at 1402)

Finally, considering the facts of the instant case, the injustice of this Court's determination subsequent to trial that the jury need not consider the purpose of the offense is manifest. The appellant presented no witnesses at trial, nor did he testify in his own behalf. While counsel on appeal did not participate at the trial level, it is surely possible that the strategy of the defense was dictated in part

by the expectation that the prosecution was required to show a benefit to the appellant and had failed to do so. Furthermore, any reasonable doubt as to appellant's guilt based upon his apparent lack of motive for the kidnaping was effectively undercut by the Trial Court's erroneous instructions. The effect of this Court's holding is to penalize the appellant who could not have anticipated the substantial departure from the standards of proof applied in previous kidnaping cases now permitted by this Court.

Conclusion

Appellant respectfully requests that upon rehearing his conviction of kidnaping be reversed applying the standard of proof cited in Wolford. Alternatively, and at a minimum, it is requested that he be granted a new trial so that he may defend in full awareness of the new standard of proof to be permitted by this Court.

Respectfully submitted,

By /s/ Rainer K. Kraus
Rainer K. Kraus

/s/ George Y. Wheeler
George Y. Wheeler

Koteen & Burt
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

Counsel for Appellant
(Appointed by this Court)

February 4, 1972

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing "Petition for Rehearing and Suggestion for Rehearing En Banc" have been sent by first class United States mail, postage prepaid, to the following on this 4th day of February, 1972:

John A. Terry, Esq.
Raymond Banoun, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D. C. 20001

/s/ George Y. Wheeler
George Y. Wheeler

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,166

UNITED STATES OF AMERICA, Appellee

v.

FRANKLIN D. SHEPPARD, JR., Appellant

On Appeal from Judgment of Conviction in the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

Rainer K. Kraus
1000 Vermont Avenue, N.W.
Washington, D. C. 20005
Counsel for Appellant
(Appointed by this Court)

February 27, 1970

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,166

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FRANKLIN D. SHEPPARD, JR., Appellant

On Appeal from Judgment of Conviction in the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this case:

(1) Whether the Trial Court erred in failing to order Mr. Sheppard acquitted on a federal kidnapping charge since at the conclusion of the government's case it was evident that the government had made no attempt to establish the purpose of the alleged kidnapping and erred in its instructions to the jury concerning the elements of kidnapping under 18 USC 1201.

(2) Whether the Trial Court erred in failing to order Mr. Sheppard acquitted of both counts of his indictment since the government's case failed to establish corroboration of Francia Napier's testimony, and in failing to instruct the jury concerning the requirement of corroboration.

(3) Whether Mr. Sheppard should be resentenced because the Probation Officer's Presentence Investigation Report contained inaccurate and misleading information, and because the Trial Court erred in basing Mr. Sheppard's sentence upon inaccurate assumptions concerning his criminal record.

This case has not previously been before this Court.

Ref. to Ruling : Oral Motion for Acquittal Denied-
(Tr., Vol II, p. 103)

STATEMENT OF THE CASE

This statement is, of necessity, based only on the testimony of witnesses for the prosecution since no defense witnesses appeared before the all-female jury which convicted Mr. Sheppard in his second trial.[1] All facts set forth are based on the testimony of Miss Francia Napier, the complainant, unless otherwise specifically indicated.

On May 28, 1968, Miss Napier attended three classes at American University until 1:30 p.m. (Tr. 5)[2] After class, she dropped her books off in her car which she had driven to the University earlier that morning. (Tr. 34) Because she had trouble starting her car, she decided to take a bus to her part-time job. (Tr. 5, 34) She walked to a bus stop near the intersection of Nebraska and New Mexico Avenues. (Tr. 7)

Although Lieutenant Robert F. DeMilt testified that, on the basis of his experience, pedestrian and automobile traffic in the area was normally "light to medium" at that time of day (Tr. 82), Miss Napier testified that there were no people around the bus stop as she waited and no cars at the intersection near the bus stop. (Tr. 7) At about 1:45 p.m., an automobile stopped near Miss Napier. The driver pointed a gun at her and said, "Get in." (Tr. 7) She did so and was ordered to roll up the window beside her. (Tr. 10) She asked the driver what he was going to do and where he was taking her. He replied, "Keep quiet." (Tr. 10)

1/ A first trial had ended in a hung jury.

2/ Citation, "Tr. ____," refers to Transcript of Trial, Vol. I.

The car traveled from Washington to Morrisville, Virginia (approximately 50 miles from the District), where Miss Napier left the car at approximately 3:10 p.m. (Tr. 12-14, 16)

During the trip, the car stopped for several traffic lights. Shortly after the start of the journey, the driver pulled off to the side of the road near a stop light located at the intersection of Canal Road and Arizona Avenue. (Tr. 13) During the minute which they remained stopped, other cars pulled up nearby waiting for the stop light at this intersection. (Tr. 13) Miss Napier had no idea why the driver chose to stop at this location. (Tr. 36)

The only conversations between the driver and Miss Napier from the time that they left the bus stop until she left the car in Virginia occurred when the driver asked her if she wanted a cigarette, which she declined (Tr. 17), and when Miss Napier asked if she could unbutton her raincoat. (Tr. 48-49) The driver's answer does not appear in the record nor does it reveal whether Miss Napier unbuttoned her coat. The record discloses no occasion while proceeding towards Morrisville when the driver touched or attempted to touch Miss Napier. Until the car reached the Morrisville area, Miss Napier made no outcry nor attempt to get out of the car. (Tr. 37-38)

At the intersection of routes 17 and 643 near Morrisville, after having ridden approximately an hour and twenty-five minutes, Miss Napier

asked the driver for a cigarette. (Tr. 19) While he was reaching into his pocket to get one, she grabbed with one hand (presumably her left) for the driver's gun [3] while opening the car door with the other. (Tr. 19) The driver kept control of the gun but Miss Napier fled without hindrance, or, indeed, any word of any kind from the driver. (Tr. 19) After leaving the automobile, she went into a diner located on route 17 near the intersection and requested that the police be called. (Tr. 20)

Miss Napier's first account of these events was made to Mrs. Evelyn James, operator of the diner, whose testimony at the trial gave no indication of what Miss Napier had said. The nature of Miss Napier's discussions with the police officer who responded to Mrs. James' telephone call from the diner was not presented by the prosecution. (Tr. 91) That night, she was questioned by another police officer (Tr. 21). The substance of that interview was not presented by the Government, although, at that time, she identified her abductor as a man of a height of 5 ft. 9 in. and weight of approximately 185 lbs. (Tr. 28), a description which does not fit Mr. Sheppard. (See STr. 28) [4] The complainant was subsequently questioned by Lieutenant Robert F. DeMilt on May 30, 1968, for the purpose of making a composite picture of her abductor. (Tr. 29) On that occasion, after completing a composite picture, she was shown a picture of Mr. Sheppard, among others (Tr. 73), and was given his name. (Tr. 32)

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3 / During the trip, the gun had been placed on the seat between the driver's legs. (Tr. 16)

4 / Citation "STr. ____," refers to Supplemental Transcript.

On May 31, 1968, Mr. Sheppard was arrested and his car impounded. (Tr. 55) Later that day, Agent Harvey E. Wilkinson of the Federal Bureau of Investigation questioned Miss Napier, obtained a search warrant from the United States Commissioner in Alexandria and inspected Mr. Sheppard's automobile. (Tr. 57-58)

Miss Napier identified Mr. Sheppard on June 25, 1968, at a hearing held before the United States Commissioner. (Tr. 60) In July, 1968, Miss Napier was taken by a member of the Metropolitan Police Department to see an automobile which was parked on K Street beneath the Whitehurst Freeway. She indicated on that occasion that this was the automobile used by her abductor. (Tr. 30-31) The record does not indicate, however, to whom this vehicle belonged.

On August 5, 1968, Mr. Sheppard was indicted for kidnapping (18 USC 1201) and assault with a dangerous weapon (22 USC 502). Mr. Sheppard pleaded not guilty to both counts at a trial held in February, 1969, which resulted in a hung jury. At a second trial held in April, Mr. Sheppard again pleaded not guilty but was found guilty on both counts and sentenced for kidnapping to a term of not less than five nor more than fifteen years and for assault with a dangerous weapon to a term of one to three years, both sentences to run concurrently. (JTr. 2) [5/]

5/ Citation, "JTr.____," refers to transcript of sentencing proceedings.

STATEMENT OF POINTS

I The Prosecution Made No Attempt To Establish An Essential Element Of The Offense Of Kidnapping: The Purpose Of The Offense. The Trial Court Erred In Failing To Acquit Mr. Sheppard Of Kidnapping At The Conclusion Of The Prosecution's Direct Case And Compounded Its Error By Instructing The Jury That Kidnapping Need Not Be For Any Purpose Whatsoever.

The Court's attention is directed to the transcript of trial, Vol. I, cited hereafter, "Tr.," p. 10, 36 and 103; to the supplemental transcript of trial, cited hereafter, "STr.," p. 79.

II The Requirement of Corroboration Applied in So Called "Sex Offenses" in This Jurisdiction Is Applicable to the Instant Case. The Trial Court Erred in Failing to Acquit Mr. Sheppard Because There was Insufficient Corroboration of the Testimony of the Complaining Witness, Miss Napier. The Trial Court Also Erred in Failing to Instruct the Jury Concerning The Requirement of Corroboration.

The Court's attention is directed to the transcript of trial, Vol. I (Tr.), pp. 7, 12-14, 16, 22, 28, 33, 71, and 97-98; to the supplemental transcript of trial (STr.), pp. 20, 28, 44, 51, 77-78; to the Probation Officer's Pre-Sentence Investigation Report (PO No. 23345, May 13, 1969). Motion to lodge this report with the Court was filed by counsel for Mr. Sheppard on February 16, 1970, and is pending.

III The Trial Court Considered The Probation Officer's Pre-Sentence Investigation Report Concerning Mr. Sheppard At The Time Of Sentencing. Because That Report Was Inaccurate And Misleading And Because The Trial Court Based Its Determination Of Sentence Upon Inaccurate Assumptions Concerning Mr. Sheppard's Criminal Record, He Should At A Minimum Be Resentenced.

The Court's attention is directed to the transcript of proceedings on sentencing, cited hereafter, "JTr.," p. 2; to the Probation Officer's Pre-Sentence Investigation Report (PO No. 23345, May 13, 1969). Motion to lodge this report with the Court is pending.

SUMMARY OF ARGUMENT

I

The prosecution case failed, indeed made no attempt, to allege and prove the purpose of the alleged kidnapper's acts.

The plain language of the kidnapping statute and its clear legislative history demonstrate that the purpose of the alleged kidnapper's act must be proven at trial. Decisions both of the Supreme Court and of appellate courts support this point.

The indictment charging Mr. Sheppard with kidnapping states that the purpose of Mr. Sheppard's alleged actions was to assault Miss Napier. There is no evidence in the record to support this alleged purpose or any other purpose. The Trial Court therefore erred in failing to acquit Mr. Sheppard of the kidnapping charge at the conclusion of the prosecution's direct case.

The error of the Trial Court was compounded by its instruction to the jury that it need not find any purpose whatsoever for Mr. Sheppard's alleged actions. The jury, without this aspect of the offense to consider, could not render a fair, reasonable verdict.

II

The requirement of corroboration applies to "sex offenses" in this jurisdiction. The indictment charging Mr. Sheppard with kidnapping

indicates that his purpose was "assault" upon Miss Napier, which in the context of the prosecution's case would, if anything, indicate sexual assault. The allegations of the complaining witness, Miss Napier, thus presented precisely the threat of prejudice to the defendant which the requirement of corroboration was meant to remedy.

Miss Napier's testimony concering the elements of the offenses charged and her identification of Mr. Sheppard was inadequately corroborated. Thus, the Trial Court erred in failing to acquit Mr. Sheppard at the conclusion of the prosecution's direct case and this error was compounded by its failure to instruct the jury concerning the requirement of corroboration.

III

The Trial Court at the time of sentencing considered a Probation Officer's Pre-Sentence Investigation Report about Mr. Sheppard. This report, insofar as it recited allegations made by an agent of the FBI concerning Mr. Sheppard's alleged involvement in a December, 1967, incident similar to that for which he was convicted, was inaccurate and misleading.

The allegations about this December, 1967 incident were clearly a determinant in Mr. Sheppard's sentencing.

Mr. Sheppard's due process rights required that he be sentenced on the basis of accurate factual data. Mr. Sheppard is therefore

entitled to resentencing, if not acquittal or a new trial on the basis of the other errors raised.

ARGUMENT

I

The Prosecution Made No Attempt To Establish An Essential Element Of The Offense Of Kidnapping: The Purpose Of The Offense. The Trial Court Erred In Failing To Acquit Mr. Sheppard Of Kidnapping At The Conclusion Of The Prosecution's Direct Case And Compounded Its Error By Instructing The Jury That Kidnapping Need Not Be For Any Purpose Whatsoever.

(Record citations are listed in the Statement of Points)

The prosecution failed to establish any motive for the kidnapping of which Mr. Sheppard was found guilty. In view of this total absence of proof, the Trial Court should have granted defense counsel's motion for acquittal made at the conclusion of the prosecution's case (Tr. 103). The failure to acquit Mr. Sheppard at that time was error which was compounded by further error in the Court's instructions to the jury about the elements of kidnapping.

The "evidence" relating to motivation consists of the following: Shortly after Miss Napier entered her abductor's automobile, she asked the driver what he was going to do and where he was taking her. (Tr. 10) The driver responded, "Keep quiet." (Tr. 10) There was no further information nor attempt to elicit information concerning the motivation

of the abductor from Miss Napier or any other witness. [a]

By statute, a kidnapper is one who:

> ". . . knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof. . . (18 USC 1201(a)) (Emphasis added.)

This language indicates on its face that purpose or motive is a material element of the offense described by the statute.

In the United States v. Varner, 283 F 2d 900, (7th Cir., 1961), the Court stated:

> "We can think of no sound reason for the conclusion that Congress in drafting the statute included these words ["and held for ransom or reward or otherwise"] without purpose. That they were deliberately included is emphasized by the fact that the original Act, enacted June 22, 1932, employed the words, "held for ransom or reward." The act was amended May 18, 1934, by adding the words, "or otherwise." Obviously, if the Government's position is sound, Congress could have accomplished the same purpose and defined the same offense by omitting the words, "and held for ransom or reward or otherwise." In our view, the words under discussion are an essential part of the offense described by Congress."

See also United States v. Bazzel, 187 F 2d 878, 882 (7th Cir., 1951):

". . .[B]efore a defendant may be convicted under the statute in question

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[a] In response to a question by defense counsel about the time that Miss Napier and her abductor stopped at the side of the road near the intersection of Arizona Avenue and Canal Road, Miss Napier indicated that she had no idea why the driver had chosen to pull to the side of the road at that location. (Tr. 36)

there must be an unlawful seizure, a holding for a specific purpose, and an interstate transportation of the victim, . . ."

The Supreme Court also has held that the purpose of a kidnapping is a material element of the offense. In Gooch v. United States, 297 U.S. 124, 56 S. Ct. 395, 80 L. Ed. 522(1936), the Court stated:

> Evidently Congress intended to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor might secure some benefit to himself. And this is adequately expressed by the words of the enactment. 6/ (Emphasis added.)

See also Chatwin v. United States, 326 U.S. 455, 460, 66 S. Ct. 233, 90 L. Ed. 468(1946) where the Court discussed "[T]he act of holding a kidnapped person for a proscribed purpose. . ." and United States v. Healy, 376 U.S. 75, 81-82, 84 S. Ct. 553, 11 L. Ed. 2d 527 (1964). 7/

The view that motive is an essential element of the crime of kidnapping is reflected in the Grand Jury's indictment, which charges that:

> "On or about May 28, 1968, within the District of Columbia, Franklin D. Sheppard, Jr. did knowlingly and wilfully transport in interstate commerce from the District of Columbia to the State of Virginia, Francia Napier, a person who had theretofore been unlawfully seized, confined, inveigled, kidnapped, carried away and held by the said Franklin D. Sheppard, Jr. for ransom, reward and otherwise, to wit, for the purpose of assaulting the said Francia Napier." (Document of the Record, 1; emphasis added).

6/ 297 U.S. at 128

7/ Dictum, although not the holding, in Healy suggests that the motive need not be criminal. But in this case, no motive -- criminal or otherwise -- has been established.

The prosecution made no attempt, however, to establish that Miss Napier's transport was undertaken for any purpose. Indeed, the elements of the offense set forth in the indictment and the elements presented by the prosecution contrast sharply. In our view, the Grand Jury's indictment correctly stated the elements of the offense to be proven by the prosecution, which failed to meet its burden.

The government's failure to establish the purpose of Miss Napier's journey left a striking gap in the record, which suggests by its very silence that the defendant had no motive or acted utterly irrationally. If no motive can be ascribed to the defendant then he should have been acquitted. If the defendant had an irrational motive, he should have been acquitted by reason of insanity and confined for treatment. The preposterous result here is that the defendant has been sentenced to jail for from five to fifteen years for what appears to have been a meaningless act. Under these circumstances, we fail to perceive a rational purpose for his proposed incarceration.

The Trial Court's error in failing to grant defense counsel's motion for acquittal at the conclusion of the prosecution's direct case was compounded by its instruction to the jury that:

there must be an unlawful seizure, a holding for a specific purpose, and an interstate transportation of the victim, . . ."

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The government's failure to establish the purpose of Miss Napier's journey left a striking gap in the record, which suggests by its very silence that the defendant had no motive or acted utterly irrationally. If no motive can be ascribed to the defendant then he should have been acquitted. If the defendant had an irrational motive, he should have been acquitted by reason of insanity and confined for treatment. The preposterous result here is that the defendant has been sentenced to jail for from five to fifteen years for what appears to have been a meaningless act. Under these circumstances, we fail to perceive a rational purpose for his proposed incarceration.

The Trial Court's error in failing to grant defense counsel's motion for acquittal at the conclusion of the prosecution's direct case was compounded by its instruction to the jury that:

> "Kidnapping need not be necessarily be [sic] for ransom, reward or other pecuniary reason, or any reason whatsoever" (STr. 79); (emphasis supplied.)

The instruction advised the jury that the purpose of the abduction was of no consequence and that the jury did not have to find "any reason whatsoever" for kidnapping. This is in sharp contrast, for example, to the uniform jury instructions proposed by the Seventh Circuit Judicial Conference Committee on Jury Instructions:

> "Kidnapping need not be for personal or pecuniary gain or for any illegal purpose, but may be for any reason whatsoever." (Manual on Jury Instructions -- Criminal, 36 FRD 457, 583.) 8/

While some courts have not required that a specific purpose be alleged in a kidnapping indictment (see e.g., Hayes v. U.S., 296 F 2d. 657, 665 (8th Cir., 1961)), we have found no appellate case that holds that a charge of kidnapping can be sustained in the absence of any probative proof of purpose for the offense. We recognize that Gawne v. United States, 409 F 2d 1399 (9th Cir., 1969) would appear to be to the contrary. However, a careful reading of that decision establishes that its statement that purpose need not be established in kidnapping cases is (1) dictum, (2) contrary to the Supreme Court cases and legislative history cited in the case, and (3) unsupported by the cases from other circuits which are said to support it. 9/

8/ We have been unable to find kidnapping instructions which have been approved by the District of Columbia Circuit Court of Appeals.

9/ The cited cases uniformly relate to the necessity of spelling out specific purpose in an indictment except for Brooks v. United States, 199 F 2d. 336 (4th Cir., 1952) which simply notes that the concept of purpose under the statute is a broad one.

By not requiring proof of purpose, the Trial Court effectively removed a substantial safeguard to the rights of the defendant. The prosecution presented a fact situation which absent proof of the allegation of purpose (and criminal purpose at that) in the indictment made out a senseless and purposeless act. Any doubt which might have arisen in the minds of the jurors concerning Miss Napier's testimony, including her identification of Mr. Sheppard as her abductor, because of his apparent total lack of motive was effectively negated by the Court's instruction.

At the very least Mr. Sheppard is entitled to a new trial at which the government should be required to establish that there was some rational purpose for his alleged offense.

II

The Requirement of Corrobroation Applied in So Called "Sex Offenses" in This Jurisdiction Is Applicable to the Instant Case. The Trial Court Erred in Failing to Acquit Mr. Sheppard Because There was Insufficient Corroboration of the Testimony of the Complaining Witness, Miss Napier. The Trial Court Also Erred in Failing to Instruct the Jury Concerning The Requirement of Corroboration.

(Record citations are listed in the Statement of Points)

In our view, the standard of corroboration applicable to the testimony of the complaining witness in this case, Miss Francia Napier, required the acquittal of Mr. Sheppard at the conclusion of the prosecution's case, when a timely motion for acquittal was made. (Tr. 103)

Viewing the prosecution's proof in the most favorable light, we find its case is, at best, peculiar. The defendant, a married man with three children, steady employment, and no record of any prior arrest for sexual crime[10/] is said to have picked up the complainant at gun-point, driven with her for approximately 90 minutes, never have propositioned her during that period, and finally permitted her to "escape" from his car in a desolate rural area without hindrance despite his retention of full control over the very pistol which allegedly induced the complainant to enter his car in Washington.

10/ See Probation Officer's Pre-Sentence Investigation Report (PO No. 23345, May 13, 1969.) Motion to lodge this document with the Court of this appeal was filed by counsel for Mr. Sheppard on February 16, 1970 and is currently pending.

The record is totally devoid of any evidence about the defendant's alleged motive for subjecting the complainant to this experience. Nevertheless, the all-female jury which heard the young complainant must have inferred that -- under the circumstances -- the silent defendant's motive was unlawful sexual assault.

We have, after careful consideration, chosen to make no argument that Mr. Sheppard should be granted a new trial on the independent ground that he was inadequately defended by assigned counsel during his second trial.[11] But the fact that no effort was made during that second trial to underline the thinness and peculiarity of the prosecution's case is no reason to ignore these characteristics in this appeal.

A rigorous standard of corroboration for alleged "sex offenses" has developed in a long line of cases in the District of Columbia.[12]

> "In a long line of decisions . . . , we have consistently held that corroboration of the testimony of complainants in so called 'sex cases' . . . is indispensably prerequisite to conviction, and for the cogent reason that for these offenses the risk of unjust conviction is high . . . We know from the lessons of the past that all too frequently such complainants have an urge to fantasize or even a motive to fabricate . . . while typically the innocent, as

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11/ Our choice is made because of the complexities of this case, particularly in relation to Mr. Sheppard's first trial which ended in a hung jury. We feel it appropriate, however, to note that the jury obviously laughed (literally, not figuratively) at assigned counsel's closing argument (STr. 51) and that assigned counsel's competency is at issue in at least two other cases now pending before this Court. (Matthews v. United States, Case No. 21,798; Hammonds v. U.S., Case No. 22,744).

12/ Coltrane v. United States, Case No. 21,843 (D.C. Cir. May 23, 1969) (Slip Op. at n. 12).

> well as the guilty, have only their testimony upon which to rely . . . We realize, too, that recriminations of that character pose an unusual threat to the reliability of a judgment on credibility of the allegedly defiled vis-a-vis the alleged defiler. Thus in prosecutions for sodomy . . . and taking indecent liberties with a minor . . . like in other sex cases . . . the traditional skepticism of courts toward [that] sort of accusation . . . has generated the requirement that satisfactory corroboration of the complainant's account, as well as negation of reasonable doubt as to the accused's guilt, must precede any conviction . . ." 13/

Thus corroboration of a complaining witness's testimony has been required in a variety of fact situations involving both felonies and misdemeanors, and not only where a sexual act was accomplished but also where events occurred, such as here, which arguably could have been designed to lead to its accomplishment. 14/

The indictment in this case charging Mr. Sheppard with kidnapping (18 USC 1201) and assault with a deadly weapon (22 D. C. Code 502) specifically states that this kidnapping was accomplished for the purpose of assaulting Miss Napier:

> "On or about May 28, 1968, within the District of Columbia, Franklin D. Sheppard, Jr. did knowingly and wilfully transport in interstate commerce from the District of Columbia to the State of Virginia, Francia Napier, a person who had theretofore been unlawfully

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13/ Id. at 5-7.

14/ E.g. invitation for immoral purposes, Kelly v. United States, 90 U.S. App. D. C. 125, 194 F.2d 150 (D.C. Cir. 1952); assault with intent to commit rape, United States v. Bryant, Case No. 22,511 (D.C. Cir. Dec. 11, 1969).

> seized, confined, inveigled, kidnapped, carried away and held by the said Franklin D. Sheppard, Jr. for ransom, reward and otherwise to wit, for the purpose of assaulting the said Francia Napier."

This reference to an apparent motive was repeated on several occasions by the prosecution and the Trial Court to the jury (STr. 20, 77-78) which had no choice but to assume that the Grand Jury, particularly considering the circumstances of this case revealed at trial, was referring to assault of a sexual nature.

The facts presented by the prosecution raised at least an inference about what the Grand Jury meant when it stated that the purpose of the kidnapping was "assault" upon Miss Napier. Thus Miss Napier, a single college girl (Tr. 33), was forced into a car at gun-point (Tr. 7) by a man whom she had never seen before (Tr. 71) and driven for approximately an hour and twenty-five minutes to a rural area of northern Virginia where she escaped. (Tr. 12-14, 16) That a prospective sexual assault was a possible purpose of the abduction could have been assumed from the context of Miss Napier's testimony at trial. Though such a motive was not established by any probative evidence, it is hard to imagine what alternative motive might have been inferred from the prosecution's case.

The jury is thus likely to have been placed in a situation which the Court in Coltrane v. U.S., supra., (Slip Op. at 6) deemed an

appropriate instance to require corroboration because of the:

> " . . . unusual threat to the reliability of a judgment upon credibility of allegedly defiled vis-a-vis the alleged defiler. . ."

As noted above, this Court has not limited the application of the requirement of corroboration to testimony alleging a completed sexual act. Kelly v. United States, supra., United States v. Bryant, supra. The testimony in this case presented, if anything, the kind of threat to a fair judgment by the jury on the credibility of the complaining witness which this Court has attempted to limit by requiring corroboration.

Here, Mr. Sheppard is accused of kidnapping and assault with a deadly weapon. Proof of the essential elements of both of these offenses is based solely upon the testimony of Miss Napier. The jury was asked to consider this testimony supported only by two corroborative facts: (1) that her purse and plastic rain hat had been found in Stafford County, Virginia, at the edge of Interstate 95 on the same day as the alleged offense (Tr. 97-98)[15/] and (2) that she appeared at a diner operated by Mrs. Evelyn James, who testified that Miss Napier was upset and asked that the police be called. (Tr. 91) There is no evidence in the record of what Miss Napier said to Mrs. James or to the police officer who responded to the call from the diner concerning the events of that afternoon.

15/ Miss Napier testified that she had left these items in her abductor's car when she got out. (Tr. 22)

In view of the limited amount and nature of the corroboration of Miss Napier's testimony, we believe that this corroboration does not meet the standard announced in Borum v. United States, ____ U.S. App. D. C. ____, ____,409 F2d 433, 439 cert. den., 395 U.S. 916 (1969).[16/]

While we understand that the concept of relevancy in the determination of corroborative proof is a broad one, there was no corroborative proof submitted by the prosecution in this case to suggest that force had been used to compel Miss Napier to travel to Morrisville. It is certainly clear that no force was used to keep her in the car at that point.[17/]

Corroboration of Miss Napier's identification of Mr. Sheppard, like corroboration of her claim of assault and kidnapping, falls far short of minimal standards. While many factual statements were subject to proof for the purposes of corroboration from sources independent of Miss Napier, none was provided. Thus, for instance, she mentioned the time of day that the incident occurred (Tr. 16), the clothing her abductor wore (Tr. 16) and the weapon that he used. (Tr. 7)

16/ " . . . 'The general and broad requirement for relevancy is that the claimed conclusion from the offered fact must be a possible or a probable or a more probable hypothesis, with reference to the possibility of other hypotheses . . .' " The obvious alternative hypothesis in this case is that Miss Napier voluntarily traveled to Virginia from American University and voluntarily left the car after a fight or argument with her companion.

17/ Defense counsel during summation to the jury suggested that the proof, cited above, in contrast to Miss Napier's testimony, supported the hypothesis that she entered and left the car voluntarily for reasons unrelated to the offenses charged. (STr 44)

The presence of her fingerprints, hair or other traces in Mr. Sheppard's automobile likewise might have been detected if she had been there. These matters then could have been used to corroborate Miss Napier's testimony but were not. The only fact submitted by the prosecution which tended to corrobroate her testimony was that Mr. Sheppard owned an automobile which was similar to the abductor's automobile as described by Miss Napier. However, the prosecution failed to establish that Mr. Sheppard had an opportunity to commit the offenses of which he was accused, failed to establish that Mr. Sheppard owned clothes similar to those described by Miss Napier, and failed to establish that Mr. Sheppard ever owned a weapon of the type which Miss Napier described. Moreover, there was no testimony that Mr. Sheppard was familiar with any of the areas in which the offense occurred.

The fact situation here is not one included within the corroboration exception set forth in such cases as Thomas v. United States, 128 U.S. App D.C. 233, 387 F2d 191 (1967), and Franklin v. United States, 117 U.S. App D.C. 331, 330 F 2d 205 (1964). In those cases, it was held that ". . . a convincing identification by the complaining witness, based on adequate opportunity to observe, need not be further corroborated." (Franklin v. United States, supra., at 209) In Thomas v. United States, supra., corroboration was found unnecessary if: "(1) there is no dispute that a rape in fact occurred, (2) consent is not an issue and (3) there is

no evidence underminding the trustworthiness of the complaining witness . . ."[18/]

Here, while actual rape was not an element of the offense alleged (and no rape occurred) there is no e v i d e n c e t h a t rape or sexual assault was ever intended by Miss Napier's abductor. Indeed, the record establishes that her abductor made no statement or move at all tending to establish such a desire. Further, the facts fairly raise at least a question about whether Miss Napier consented to her abduction. She made no effort to leave her abductor's car in crowded traffic in the District, yet "fled" without hindrance in a remote rural area despite the fact that her alleged abductor still retained full control over a gun. At the very least, this evidence is not fully consistent with lack of consent by Miss Napier.

Finally, at least some question exists about Miss Napier's trustworthiness as a witness. Miss Napier was questioned on at least four occasions (twice on May 28, 1968, once on May 30, 1968 and again on May 31, 1968)[19/] about the circumstances of her abduction. Of these four interrogations the only facts which appear in the record, other than the details of a composite photo made on May 30, are that her original description of the abductor on May 28 indicated that he was 5 ft. 9 in.

18/ 387 F2d at 192.

19/ Tr. 91, 21, 29 and 57-58.

and weighed approximately 185 lbs. (Tr. 28) The prosecution itself recognized that this description was of no real value in identifying her abductor. (STr. 28) Moreover, the record does not reveal any evidence concerning her initial description of the automobile used by the abductor against which her later descriptions could be checked. In the absence of any further information concerning these interrogations, it cannot be assumed that Miss Napier's initial description of her abductor or the circumstances of her abduction were consistently maintained throughout the investigation. Indeed, the contrary appears to be the case. Thus, the trustworthiness of the complaining witness was not adequately established at the trial.

In view of the foregoing, it is clear that this case presented a potential for prejudice to the defendant's rights at trial which the requirements of corroboration developed in this jurisdiction were meant to remedy. Miss Napier's claim of assault and kidnapping and her identification of Mr. Sheppard were presented at the trial below in a context that demanded corroboration of the allegations. The defendant's motion for acquittal should have been granted. Should the Court find that there was sufficient evidence tending to corroborate Miss Napier's statements to warrant submission of the case to the jury, the failure of the Court in the trial below to instruct the jury concerning the standards of corroboration applicable to such cases should require that Mr. Sheppard be granted a new trial.

III

The Trial Court Considered The Probation Officer's Presentence Investigation Report Concerning Mr. Sheppard At The Time Of Sentencing. Because That Report Was Inaccurate And Misleading And Because The Trial Court Based Its Determination Of Sentence Upon Inaccurate Assumptions Concerning Mr. Sheppard's Criminal Record, He Should At A Minimum Be Resentenced.

(Record citations are listed in the Statement of Points)

One further aspect of the trial below seriously prejudiced Mr. Sheppard's rights. This prejudice arose because, in sentencing Mr. Sheppard, the Trial Court considered and relied upon information presented in a Probation Officer's Pre-Sentence Investigation Report (PIR) which was both inaccurate and misleading and based Mr. Sheppard's sentence upon materially inaccurate assumptions(whether from the PIR or some other source) about his criminal record.

The record of the sentencing in the trial below contains the following statements by the Trial Court about Mr. Sheppard's alleged involvement in an incident similar to the one for which he was found guilty by the jury:

> "THE COURT. Mr. Sheppard, there is a full probation report. There is an indication that you were involved in the same kind of conduct as the conduct for which you were convicted which happened in December of 1967, also involving the forcing of a young girl, in this case at knife point, into your car and taking her to Virginia.

> "Under the circumstances, we don't have much alternative.
>
> "It is the judgment of this Court, Mr. Sheppard, that you be sentenced on count one, which is a conviction for kidnapping, to a term of not less than five nor more than 15 years; that you be sentenced on count two, assault with a dangerous weapon, to a term of one to three years; that both of these sentences be served concurrently." (JTr. 2; emphasis added.)

These remarks by the Trial Court indicate that it was informed of a December, 1967, incident similar in many respects to the instant case, and that Mr. Sheppard's alleged involvement in that earlier alleged incident was considered by the Court in determining sentence here. The obvious source of the Trial Court's information was the PIR to which the Court referred at the outset of its remarks.

The PIR concerning Mr. Sheppard, access to which was granted to counsel for Mr. Sheppard by the District Court in conjunction with this appeal, contains a special subsection captioned "For the Information of the Court." Counsel was not permitted by the District Court to make a copy of the PIR, but was permitted to make notes on the pertinent subsection. Those notes follow:

> "The Probation Office was contacted by Agent Wilkinson, FBI, on 4-17-69. Agent Wilkinson stated that the defendant was charged with taking a girl at knifepoint, from the street at Ward Circle, in December, 1967. The victim was tied up and driven to Virginia, where the victim permitted sexual relations. The victim was then returned to the District of Columbia and released. The FBI photographed Sheppard at that time, that

> picture later used to establish the identity of Sheppard in the instant offense. The U. S. Attorney declined to prosecute on the above case." (Emphasis supplied) 20/

See Probation Officer's Pre-Sentence Investigation Report (PO No. 23345, May 13, 1969).

Contrary to the allegations of the FBI agent recited in the PIR, Mr. Sheppard denies any involvement in that prior, similar, incident. He states that no proceedings were undertaken against him with respect to the incident referred to by the Trial Judge and, indeed, that he was never arrested or detained by the police in connection with that matter. 21/ Furthermore, we note the absence of any reference to this December, 1967, incident in the section of the PIR dealing with Mr. Sheppard's "Prior Record." Considering both the content of the PIR and Mr. Sheppard's statements--which are not necessarily in conflict--we believe that the remarks about the December, 1967, incident in the PIR were obviously prejudicial to Mr. Sheppard.

There are two possible interpretations of the Trial Court's statement in the transcript of sentencing that "There is an indication

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20/ The PIR does not allege that a formal "charge" was made or identify the source of any "charge." Nor does it indicate why the "U. S. Attorney"--who may have felt that there was no case against Mr. Sheppard or that the complainant was untrustworthy -- "declined to prosecute. . ."

21/ These statements have, of necessity, been made to counsel. We are prepared to submit Mr. Sheppard's statements in affidavit form if the Court considers such action appropriate.

that you were involved in the same kind of conduct as the conduct for which you were convicted. . ." (JTr. 2) The first is that the Trial Court, knowing that no determination of probative value implicating Mr. Sheppard in the December, 1967 incident had been made, chose to consider mere allegations made by the FBI set forth in the PIR. The other interpretation is that the Trial Court was either mislead or mistaken as to the existence and disposition of proceedings implicating Mr. Sheppard in connection with the December, 1967 incident. We submit that under either interpretation, the Trial Court violated the due process rights of Mr. Sheppard.

The principle of sentencing based upon rational principles and an accurate record concerning a defendant has been long established. See Note, Procedural Due Process at Judicial Sentencing for a Felony, 81 Harv. L. Rev. 821, 845-846(1968). This principle is based upon the applicability of the due process clause of the Fifth and Fourteenth Amendments to the sentencing process. Townsend v. Burke, 334 US 736, 741, 68 S. Ct. 1252, 92 L. Ed. 1690(1948);[22/] Williams v. People of State of New York, 337 US 241, 252, 69 S. Ct. 1529, 93 L. Ed. 1337 (1949). See also Smith v. United States, 223 F 2d 750 (5th Cir., 1955) and United States v. Myers, 374 F 2d 707 (3rd Cir., 1967).

22/ ". . .[T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U. S. at 741.

The fact that neither Mr. Sheppard nor his counsel objected to the statement of the Trial Court that Mr. Sheppard was involved in the December, 1967, incident does not vitiate Mr. Sheppard's due process right to have his sentence based upon accurate factual statements. In United States v. Myers, supra., the Court stated:

> "The Supreme Court [in Townsend v. Burke, supra.,] saw the wrong incurred as careless or designed sentencing on the basis of materially untrue facts and assumed that such injustice normally would be precluded by the presence of counsel. This, of course, is premised upon the effective protection by counsel at this juncture, not merely his 10/ physical attendance. The District Judge, in another case, stated with regard to a counseled defendant:
>
> > We recognize that on a guilty plea the relator was not entitled to have much said on his behalf but he was entitled to not have material misstatements read to the Court while his counsel stood mute. Townsend v. Burke. . . "

10/ United States ex rel. [John] Jackson v. Rundel, 219 F. Supp. 538, 541, (E. D. Pa. 1963)[emphasis in original]. 23/

We believe that counsel for the defense in the trial below was ineffective insofar as he remained mute when clearly inaccurate information was presented by the Court at the time of sentencing.

Since the erroneous PIR statements and the Trial Court's erroneous assumptions were obviously significant in the determination of Mr. Sheppard's sentence, he must be resentenced. "The price of correcting the injustice is insubstantial; the appellant can readily be resentenced." United States v. Myers, supra., at p. 711.

23/ 374 F 2d at 710

CONCLUSION

The judgments of conviction should be reversed and Mr. Sheppard discharged. Failing that, the convictions should be reversed and the case remanded to the District Court for a new trial with instructions that (1) the purpose for the abduction with which Mr. Sheppard has been charged must be established beyond a reasonable doubt to sustain a conviction for kidnapping under 18 USC 1201; and (2) the prosecution must corroborate the testimony of the complaining witness, Miss Napier, and that proper instructions concerning corroboration be given to the jury. Should the conviction of Mr. Sheppard on either count of the indictment be allowed to stand or, in the event of a new trial, should he be convicted again, the District Court should be instructed that it must not base determinations of sentence upon materially inaccurate information or upon allegations of previous criminal conduct for which Mr. Sheppard has never even been arrested.

Respectfully submitted,

Rainer K. Kraus

George Y. Wheeler

1000 Vermont Avenue, N. W.
Washington, D. C. 20005

Counsel for Appellants
(Appointed by this Court)

February 27, 1970

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,166
Crim. No. 1192-68

UNITED STATES OF AMERICA, Appellee

v.

FRANKLIN D. SHEPPARD, JR., Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTARY MEMORANDUM FOR APPELLANT

April 30, 1971

Rainer K. Kraus
George Y. Wheeler

1000 Vermont Avenue, N. W.
Washington, D. C. 20005

Counsel for Appellant
(Appointed by this Court)

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SUPPLEMENTARY MEMORANDUM FOR APPELLANT

INTRODUCTION

On February 18, 1971, almost a year after the filing of our first brief on behalf of the appellant, we filed a separate appeal from the District Court's "Findings, Conclusions, and Order" of February 5, 1971, which modified the official transcript in this case on a point which we had specifically alleged to be reversible error in our Brief of February 27, 1970. That notice of appeal was granted on February 25, 1971, and has since been docketed and consolidated with the present case.

As discussed in our original brief (pp. 16-17), the Trial Court's instructions to the jury as shown in the official -- uncorrected -- transcript of the proceeding were:

> "Kidnaping need not be necessarily be for ransom, reward or other pecuniary reason, or any reason whatsoever" (STr. 79; emphasis supplied).

In effect, the jury was advised that the purpose of the abduction was of no consequence and that the jury did not have to find "any reason whatsoever" for kidnaping. We stated then that this matter was reversible error. (Brief for Appellant, pp. 17 and 32.)

On June 16, 1970, the Government filed a "Motion to Correct Record" in the District Court, pursuant to Rule 10(e) of the Federal

Rules of Appellate Procedure. It requested that the supplemental transcript of Mr. Sheppard's trial, containing the instructions to the jury be changed in part to read as follows:

> "Kidnaping need not necessarily be for ransom, reward or other pecuniary benefits, but may be for any reason whatsoever."

The Government's version of the instructions required the deletion of three words and the substitution of five new words, and the meaning of the instructions was completely changed. Instead of language indicating that no purpose for the offense need be found, the jury, according to the Government's version of the instructions, had been specifically requested to make such a finding.

The reason suggested by the Government for the requested change in the official transcript of the instructions appears in its "Motion for Extension of Time in Which to File Appellee's Brief" of June 16, 1970:

> "This [alleged transcription] error is a material one which would substantially affect the disposition of this appeal if it remains uncorrected. . ." (p. 1, emphasis supplied.)

This conclusion by the Government was reached in tacit if not explicit agreement with appellant's position that these instructions, if delivered as reported, constituted reversible error.

In support of its motion to correct the record, the Government submitted an affidavit by the prosecuting attorney at the trial below stating his recollection -- nearly 15 months after the close of the trial below -- that the court's instructions to the jury on the offense of kidnaping as actually delivered, differed from the language reported in the official transcript and that a review of the court's written instructions confirmed his rather remarkable memory.

An "Opposition to Motion to Correct Record" filed July 6, 1970 by appellant was grounded on a counter-affidavit by the official court reporter, Martha Jane Maloney, who stated that she had reviewed the questioned portion of her shorthand notes which formed the basis for the official transcript and had found the (uncorrected) official transcript to be accurate. Mrs. Maloney also noted that she had compared her transcription with a tape recording of the proceeding prior to filing the official transcript and that the accuracy of her official transcript was thus assured. In addition, she stated that the specific changes requested by the Government ". . . would have required the commission of errors which are very unusual in the Gregg System."

There were no other pleadings filed before the District Court nor were any proceedings held before the District Court on this matter.

On February 5, 1971, Judge John H. Pratt, who was the trial judge below, (Findings, para. 1), issued his "Findings, Conclusions, and Order" modifying the official transcript of the instructions to the jury precisely as the Government had requested. Just as the Government had done, Judge Pratt emphasized that the language in question ". . . was a key instruction as to the elements of the charge of kidnaping" (Findings, para. 3). He further held that it had occupied a ". . . central position . . . in the trial." (Conclusions, para. 1.)

Judge Pratt based his conclusion that the record should be revised on the following grounds: (1) that his prepared jury instructions in this case, at least a portion of which were still preserved in his files, constituted sufficient evidence to modify the transcript, without reference to the recollection of Government counsel or the court (Findings, para. 4); (2) that "judicial notice of the fact that other problems regarding Mrs. Maloney's [the Court Reporter] transcripts have arisen in other cases "could properly be taken

(Findings, para. 5); and (3) "that the tape recording of the proceedings in question is no longer extant." (Findings, para. 5.)

Judge Pratt failed to cite or rely on any independent personal recollection of these matters or, indeed, to rely specifically on Government counsel's alleged recollection. Indeed, of the findings mentioned above, two of which were apparently made for the sole purpose of discounting the credibility of the court reporter's affidavit, the only apparent basis for the court's conclusion was its unsupported determination that its own oral instructions to the jury must have been delivered precisely as they had been prepared.

Appellant promptly thereafter filed a separate appeal from the District Court's "Findings, Conclusions, and Order" of February 5, 1971, modifying the record. That appeal was consolidated with our initial appeal. This supplementary memorandum discusses only the ramifications of the post-appeal record "correction" made by the District Court at the Government's request after the filing of our initial appellate brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in addition to those matters raised in our earlier brief in this case:

(1) Whether the District Court erred in failing to deny the Government's motion to correct the record since the Government had failed to sustain its burden of proof pursuant to its motion to correct the record.

(2) Whether the District Court erred in failing to order a hearing, which should have been held before a judge other than the trial judge, on the Government's motion to correct the record.

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SUMMARY OF ARGUMENT

I

The District Court erred in failing to deny the Government's motion to correct the record since the Government had failed to sustain its burden of proofon this motion.

Case law has established that the moving party has the burden of proof to overcome the prima facie verity of the record. Considering the issues involved here, that burden requires proof beyond a reasonable doubt.

Upon examination of the evidence presented by the Government and discussed in the District Court's "Findings, Conclusions and Order," it is clear that the Government's burden has not been met.

II

The District Court erred in failing to order a hearing which should have been held before a judge other than the trial judge concerning the Government's motion to correct the record.

This Court has clearly required that (1) the full rigors of evidential and procedural safeguards available

in the trial process should be afforded to an appellant when material disputes about the accuracy of the record are involved and (2) where a dispute as to the record may turn upon the trial court's recollection of events at trial or upon materials to be obtained from the trial court's files, the trial court should not act as both judge and witness in that dispute.

On the basis of the facts in this case, it is clear that a hearing should have been ordered and that such a hearing should have been held before a judge other than the trial judge. The failure of the District Court to require a hearing where he could appear as a witness only was error.

ARGUMENT I

The Government failed to sustain its burden of proof with regard to its Motion to Correct the Record.

The Government failed to sustain its burden of proof with regard to its "Motion to Correct Record" filed June 16, 1970.

In its motion the Government contended that the court reporter who produced the official transcript of the instructions to the jury ". . . appears to have incorrectly transcribed [this] portion of this court's instructions to the jury . . ." (p. 1). As reported at p. 79 of the official supplemental transcript, the court stated:

> "Kidnaping need not be necessarily be for ransom, reward or other pecuniary reason, or any reason whatsoever."

The version of these instructions advanced by the Government, however, would require deletion of three words from the official text and the addition of five new words as follows:

> "Kidnaping need not necessarily be for ransom, reward or other pecuniary benefits, but may be for any reason whatsoever. (Emphasis supplied.)

The Government's version of the court's instructions to the jury required substantial changes in the official transcript and resulted in a fundamental change in the meaning of the instructions.[1/] The official transcript of the instructions had, of course, stated that the jury need find no reason or purpose for the offense of kidnaping.

We argued in our brief of February 27, 1970, more than three months prior to the filing of the Government's motion to correct the record, that this instruction constituted reversible error. (Brief for Appellant, pp. 16-17.) The Government's proffered version of this instruction, which has been as adopted by the District Court, however, substitutes language which would have required the jury to make a finding concerning the reason or purpose for the offense -- an instruction which, if actually given, would have been proper and necessary, in our view. This critical change of the official transcript on a material point already presented for appellate review involves a sharply-disputed factual

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1/ As we have noted (pp. , supra.) there has been no dispute about the fundamental importance of this matter between counsel for the appellant, counsel for the Government, and the Trial Court.

controversy as to what the jury actually heard during this portion of the Trial Court's instructions.

The clear meaning of the official transcript of the instructions undeniably indicates that no finding concerning the reason or the purpose of the offense of kidnaping was requested or required by the court. Nor can we find any language elsewhere in the instructions which would tend to show that the court's reported instructions on this point were different from that transcribed. On this basis, we submit the official transcript must ". . . be deemed prima facie a correct statement of the testimony taken and proceedings had" as required by 28 U.S.C. 753(b) and the Government had the burden of overcoming its prima facie accuracy.

The extent of the Government's burden has been succinctly stated by the Supreme Court In re Wight, 134 U.S. 136, 145, 10 S. Ct. 487, 490, 33 L. Ed. 865 (1890), quoting from Bilansky v. State of Minnesota, 3 Minn. 427 (Gil. 313):

> "While we should go as far as any court in reprobating a rule to place the proceedings of a court almost entirely at the mercy of the subordinate officials thereof, we should be scrupulously careful in adopting any rule which would tend to destroy the sanctity or lessen the verity of records. And while we admit the power to amend a record after the term has passed in which the record was made up, we deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made . . ." (Emphasis added)

This same heavy burden is reflected in Kennedy v. Reid, 101 U.S. App. D.C. 400, 249 F.2d 492 (1957) and Downey v. U.S., 67 App. D.C. 192, 91 F.2d 223 (1937). Thus it is clear that the Government was required to prove beyond any reasonable doubt that the transcript modification which it sought should be made -- and that there was no serious doubt about its appropriateness.

We submit that the Government's burden was not met. Indeed, the Government rested on its moving affidavit and never even attempted to rebut or otherwise challenge the accuracy or relevancy of the subsequently-filed affidavit of the official court reporter which stood unchallenged before Judge Pratt and still stands unchallenged by any counter affidavit or evidence. The District Court's Conclusions in its "Findings, Conclusions, and Order" of February 5, 1971, granting the correction of the transcript requested by the Government, rely solely on a comparison the court's prepared jury instructions with the official transcript. Notable by its absence is any finding or conclusion that the change was based upon its own recollection of this matter. In addition the court chose not to rely upon the only basic allegation set forth in the Government's motion, the personal "recollection" of the prosecuting attorney at the trial below.

Most significant, however, was Judge Pratt's refusal to credit at all the sworn statement of the court reporter that after rechecking her shorthand notes, the official transcript (which had itself been corroborated by a recording of the proceeding), was found to be accurate. The court made no finding that the official reporter might be biased or otherwise have any reason to submit an affidavit which was less than fully candid. Instead it simply chose to correct a prima facie error in its own instructions which it itself viewed as of fundamental or "central" importance, for no clearly-delineated reason. The shorthand record is, we submit, the single most persuasive existing evidence of what was actually stated during the trial and it remains unchallenged by either the District Court or the Government. Nor did the Government or the District Court enter any evidence or make any findings to refute Mrs. Maloney's sworn statement that the corrections requested by the Government ". . . would have required the commission of errors which are very unusual in the Gregg System." (Affidavit of court reporter, p. 2.) In the face of these undisputed facts, the District Court clearly should not have "corrected" the prima facie correct official transcript of these proceedings.

Nor do we believe the court's findings and conclusions -- even if unchallenged -- to be sufficiently persuasive to support the change pressed by the Government, absent concurrence by counsel for the appellant in the proposed change. Apparently the court's ruling relied solely upon its review of its own prepared jury instructions, some portion of which was still available in the court's private files and was made available first to counsel for the Government and then to counsel for the appellant.

But it is quite apparent that the court departed frequently from the language of its lengthy prepared kidnaping instructions -- and not simply at the point in issue here. Attachment A hereto is a copy of the court's prepared instructions. A separate motion to lodge this document with the court is being filed simultaneously. The departures from the court's prepared instructions -- as reported in the official transcript prior to its "correction" -- are set out as clearly as possible in Appendix A. The modifications reported by the reporter are, for the most part, sensible and logical -- for example, changing prepared references to the victim from "him" to "her" (Appendix A, p. 4, Line 15). It is inconceivable to us that all of the apparent changes were caused by any ineptness on

the part of the official reporter.[2/] And, if all of the apparent deviations from the prepared and faithfully-delivered instruction were caused by what could only be characterized as the reporter's total incompetence, then we fail to see how the official record of the trial below can stand for any purpose. If the official transcript is filled with such serious and numerous departures from the true record below, neither we nor this Court can have any fair basis for appellate review and, we submit, the defendant is thus entitled to a new trial which is faithfully recorded,on this independent ground.

It hardly needs saying that the record on appeal must necessarily be, as far as possible, a verbatim record of what the court reporter and the jury heard. In this connection, it is important to reiterate that the court clearly avoided any claim of reliance on its own recollection of the change or that of the prosecuting attorney whose affidavit was before it.

And finally, we submit that the District Court's assumption of "judicial notice of the fact that other problems regarding

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2/ The reporter's contention that her transcription was carefully checked against a recording of the proceeding seems strengthened by the apparent post-initial typing addition of the word "therefore" at STr. 77, Line 18. Note also the reporter's treatment of that portion of the prepared instruction that was preceded by the apparently indistinct and hand-written introductory work "for," the omission of which would have resulted in a somewhat confusing sentence (as was in fact, reported) and the addition of the interjected (not prepared but reported) "of course" at the end of the fifth paragraph of the prepared charge. (Appendix A, p. 3, Lines 15-18.)

Mrs. Maloney's transcript have arisen in other cases" (Findings, para. 5) is hardly dispositive, fair or relevant.

As stated in 9 Wigmore, Evidence, §2567 (Third Edition), mere taking of judicial notice is not conclusive of the factual proposition which it is said to support:

> "(a) That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that it will not be disputed. But the opponent is not prevented from disputing the matter of evidence if he believes it disputable." (Emphasis in original)

But counsel for the appellant was not given any opportunity to consider or dispute these allegations by the District Court since we did not learn of these alleged and totally unspecified "problems" regarding Mrs. Maloney's transcripts "in other cases" until the issuance of its "Findings, Conclusions, and Order" of February 5, 1971.

Surely the court was obligated to disclose any facts to which it was making reference and relate those facts, if possible, to the change which it made in the transcript. Undersigned counsel frankly have no knowledge of any such possibly relevant facts and, indeed, it was our view prior to the Government's challenge of the official

transcript that it appeared to be an able and careful piece of work, and one which was substantially superior to most initial transcripts of hearings before the Federal Communications Commission with which are particularly familiar.

It is certainly clear that the court's apparent assumptions about Mrs. Maloney's transcripts in other cases remain untested both as to their relevance and accuracy. We therefore submit that this element of the findings of fact can not be accorded any weight in determining whether there was adequate evidence to support the District Court's Order.[3/]

In view of the foregoing, we submit that the District Court erred in correcting its officially-reported instructions to the jury at trial since the Government has failed to sustain its burden of proof as the moving party. Consequently, the order of the District Court must be reversed.

3/ We submit in addition that the reference to the alleged "problems" with Mrs. Maloney's transcripts in the District Court's findings of fact is so vague as to defy appropriate appellate review of its relevance or accuracy. At a very minimum the ambiguities surrounding this matter would require remand to the District Court to resolve what facts, opinions or other matters were comprehended by the District Court's judicial notice.

ARGUMENT II

The District Court erred in failing to order a hearing which should have been held before a judge other than the trial judge on the Government's motion to correct the record.

The District Court erred in failing to order a hearing which should have been held before a judge other than the trial judge on the Government's motion to correct the record.

As stated by this Court in Gilliam v. U.S., 106 US App. D.C. 103, 269 F.2d 770 (1959), the appropriate procedure to be followed by the District Court in reviewing a motion to correct the record is the following:

> "If the sentencing court [in the instant case, the trial court], after . . . [review of a motion to correct the record], shall conclude that a sufficient showing has been made, a hearing should be ordered before a judge other than the sentencing judge [in the instant case, the trial judge] as it might be necessary for the sentencing judge to be a witness. See Downey v. United States, 1937, 67 App. D.C. 192, 91 F.2d 233." (269 F.2d at 773.)

Clearly on the basis of the record in the instant case this procedure should have been followed, but it was not.

At stake before the District Court considering the Government's motion was no technical or inconsequential matter. We have

previously indicated that the brief for the Appellant specifically cited the language of the trial court's instructions to the jury at issue here as reversible error (Brief for Appellant, p. 17 and 32). This point is clearly material to the Appellant, who stands to serve a five to fifteen year sentence on the basis of a conviction which, we believe, should be reversed because of the words used by the court in this instruction.

Both the Government and the District Court have confirmed the special significance of the language in issue here to the determinations of this Court. The Government, for its part, stated to this Court in its "Motion for Extension of Time in Which to File Appellee's Brief" of June 16, 1970, that:

> "This [alleged transcription] error is a material one which would substantially affect the disposition of this appeal if it remains uncorrected . . ." (p. 1)

Similarly the District Court emphasized in its "Findings, Conclusions and Order" that the language in question ". . . was a key instruction as to the elements of the charge of kidnaping" (Findings, para. 3) and that it occupied a ". . . central position . . . in the trial." (Conclusions, para. 1.)

Against this background it is clear that a fair hearing to determine the truth of what was uttered to the jury -- or what the jury heard -- is a necessity to provide evidentiary and procedural safeguards to the appellant. This Court in Downey v. U.S., supra., stated:

> "We are of the view, to use the phrase of the Patterson Case, [4/] that there should be 'materials in existence for altering the form of the judgment,' and by materials we mean legal materials, that is to say, materials arrived at under the usual legal safeguards in respect of the ascertainment of facts. There should be, in a proceeding to correct a record of sentence alleged to be erroneous, in the absence of clear stipulation or admission by the affected party as to the original fact, a judicial determination thereof . . . The party moving to correct the record should have the burden of proof. The party opposing correction of the record should have the usual rights of inspection, and cross-examination and proof." (91 F. 2d at 235)

The District Court's consideration of the Government's motion did not afford these procedural safeguards to the appellant.

Our contention that this error was by the District Court appears to be confirmed in one of the Government's pleadings to this Court about this matter. In its "Reply to Appellant's Comments about Appellee's Motion for Extension of Time" the Government stated that ". . . we expect that the matter will be

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4/ United States v. Patterson, (CC) 29 F 775.

set for a hearing in the District Court after the trial judge returns from leave on August 1, 1970." (Reply, p. 2) While this expectation was not fulfilled, we submit that it certainly indicates that a hearing was anticipated by the parties.

We have already discussed the effect of the failure of the District Court to make any significant review or analysis of the sharply-conflicting facts before it in its "Findings, Conclusions, and Order" of February 5, 1971 (Argument I, above). Particularly with respect to the District Court's judicial notice of alleged "problems" concerning Mrs. Maloney's transcripts in other cases, the right of "inspection and cross-examination and proof" by the Appellant of this apparent decisional basis was imperative. At the very least, such a procedure might be expected to have unearthed sufficient details about any such matters to have permitted a fair review by this Court of their relevance, accuracy and significance. These judicial notice allegations by the District Court, as well as the other factual matters in dispute, clearly should have been explored in hearing and the failure to order such a hearing was an error which appears to require a remand of this case for the purpose of conducting such a hearing, prior to consideration of our basic appeal.

Any hearing concerning the Government's motion should have been -- and should be -- before a judge other than the trial judge. In Downey v. U.S., supra., this Court delineated the public policy which requires this procedure:

> "If, in the event of such error, the correction of the record involves determination of a dispute of fact as to what the uttered, as distinguished from the entered, order of a judge was, and if that question must be determined by the memory of the judge alone, or by recourse to his files, or by both, there is in our view no proper reason why he should not be called upon to testify like any other witness, or why the contents of his files should not be subject to introduction in evidence like any other paper. Exemption of a judge and his files from the usual processes of the law which safeguard the ascertainment of facts, especially in such a situation as the instant one, wherein correct determination of the fact is of crucial importance to the public interest and to individual liberty, is not warranted. The dignity of a judge's office will not be lessened by the judge's being witness only, rather than judge and witness both."
> (91 F. 2d at 235; emphasis supplied)

The force of this policy is clearly applicable to the instant case since the judge who ruled upon the Government's motion was also the trial judge below. (See "Findings," para. 1)

While we have previously stated in Argument I that the District Court did not appear to base its conclusion upon its own recollection of this trial, we believe that Judge Pratt's memory

of these events might be a proper subject for consideration in resolving the dispute. It seems clear that his testimoney would be relevant and necessary to contrast and compare the numerous apparent departures from his prepared kidnaping instruction shown in Appendix A. This alone requires that the presiding judge at a hearing on this matter must not be the trial judge since the bare possibility that the testimony of the trial judge may be necessary to make a proper determination of the factual dispute should preclude the trial judge's participation as trier of the issue.

Moreover, Judge Pratt's judicial notice of as yet undisclosed "problems" with Mrs. Maloney's transcripts in other cases (Findings, para. 5) is so imprecise as to demand further specification, if the Government would itself rely on it.

On the basis of the foregoing, we submit that the District Court erred in failing to order a hearing before a judge other than the trial judge on the Government's motion. Consequently the District Court's order correcting the transcript must be reversed and remanded for hearing. We further submit that such a hearing may well be necessary without regard to whether the transcription change in question is of fundamental importance, unless the Government withdraws its challenge to the accuracy of the uncorrected

official transcript. For, if the Government is correct -- and the Trial Court's expressed reservations about the general accuracy of the official reporter's work are accurate -- the appropriateness of basing any review of the proceeding below on Mrs. Maloney's record of it is open to the most serious question. There can be no fair review of the trial below in the absence of a transcription which reflects, with reasonable accuracy, what actually happened. If crucial testimony or argument below may have been altered as substantially as the Government says the kidnapping instruction was altered, we do not see how we, at least, as court-appointed counsel who must rely solely on the official record, can properly perform our assigned duties.

Respectfully submitted,

By /s/ Rainer K. Kraus
Rainer K. Kraus

By /s/ George Y. Wheeler
George Y. Wheeler

Koteen & Burt
1000 Vermont Avenue, N. W.
Washington, D. C. 20005

Counsel for Appellant
(Appointed by this Court)

April 30, 1971

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing "Supplementary Memorandum for Appellant" and Appendix A thereto, have been sent by first class United States mail, postage prepaid, to the following on this 30th day of April, 1971:

John A. Terry, Esq.
Gregory C. Brady, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D. C. 20001

/s/ Rainer K. Kraus
Rainer K. Kraus

Appendix A

The Trial Court's Prepared Kidnapping Instructions on Kidnapping And the Official Transcript of Those Instructions

In order to demonstrate to this Court the very extensive differences between Judge Pratt's prepared instructions and the uncorrected official transcript of those instructions, an exact copy of Judge Pratt's prepared instructions follows as Pages 2-5 of this Appendix. A separate motion to lodge Judge Pratt's prepared instructions is being filed simultaneously.

These instructions were furnished to undersigned counsel by counsel for the Government on appeal, following submission of the Government's motion to correct the record which referred to the instructions but did not submit them and our inquiry to Government counsel as to their availability.

Departures from Judge Pratt's prepared instructions, as reported in the official transcript prior to the "correction" at issue are shown as follows:

1. Bracketed words, phrases or sentences in the prepared instructions were omitted entirely in the recorded instructions.

2. Underlined words or phrases in the prepared instructions were modified as indicated in changes above the underlining in the official transcript.

3. Words or phrases inserted with a caret are found in the official transcript but were not part of the prepared kidnapping instructions.

KIDNAPPING – Federal

[The first count of the indictment charges the offense of kidnapping. Kidnapping is a violation of Section 1201 -- Title 18, Section 1201 of the United States Code.] I will read to you in pertinent part what the United States Code says on this subject the law of this crime.

omitted entirely

"Whoever shall knowingly transports in interstate or foreign commerce any person who has been unlawfully seized, confined, [inveigled, decoyed,] kidnapped, abducted or carried away and held for ransom [or] reward or otherwise, except in the case of a minor by a parent thereof, and shall be punished [as provided] by law."

The first count charges that on or about May 28, 1968, within the District of Columbia, [defendant] Franklin D. Sheppard, Sr. did knowingly and willfully transport in interstate commerce from the District of Columbia to [the State of] Virginia one Francia Napier who had theretofore been unlawfully seized, confined, kidnapped, abducted, and carried away [and held] by the said Franklin D. Sheppard, Sr. for ransom, reward or otherwise; [to-wit,] for [the] purposes of assaulting the said [Francia Napier.] on

Now, the essential elements of the offense of kidnapping [are] set forth in Section 1201[, Title 18 of the United States Code and] are the following of the statute. Each of these elements which the Government must prove beyond a reasonable doubt.

First One, that the defendant transported or aided or abetted or caused the transportation of a person in interstate commerce [as] charged in the indictment. In connection with this element of the offense, you are instructed that a person is transported in interstate commerce whenever he or she is transported across a the state line, from one state to another, or from the District of Columbia to another state. In other words, you must find the [victim] defendant to be convicted of the alleged offense was transported across a the state line[.] The purpose of this element of the offense, is the border of the District of Columbia and the neighboring State of Virginia is, of course, a state line.

The second essential element is that the defendant transported such person the said, Francia Napier, in interstate commerce knowingly and willfully.

Kidnapping -3-

An act is knowingly done if it is done voluntarily [and] intentionally and not because of mistake [or] accident or [other] unknown reasons. An act is done willfully if it is done voluntarily [and] intentionally, and with the specific intent to do something the thing which the law forbids; that is to say, for bad purpose or to disobey or disregard the law.

The third essential element is that the defendant transported Francia Napier in interstate commerce while Francia Napier was unlawfully seized [or] confined [or inveigled or kidnapped or] and carried away and or held for ransom, reward or otherwise. Unlawfully means contrary to the law. [To] kidnap means forcibly or unlawfully [to] abduct ing or steal ing away or carry ing away a person and to detain him or her against his or her will. To inveigle It means to lure away [or] entice or lead away [by false representations] or promises or other deceitful means.

You must find [involuntariness or] coercion in connection with the victim seized and detention. Such coercion must be done with [the] willful intent to confine the victim and it may be achieved by mental as well as

physical means. Kidnapping need not be necessarily be for ransom, reward or other pecuniary reason benefits,[but may be for or any reason whatsoever.

U.S. v. Franklin D. Sheppard, Sr. Cr. No. 1192-68

February 6, 1969

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,166

UNITED STATES OF AMERICA, *Appellee,*

v.

FRANKLIN D. SHEPPARD, JR., *Appellant.*

Appeal from the United States District Court for the District of Columbia

---

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
GREGORY C. BRADY,
Assistant United States Attorneys.

Cr. No. 1192-68

INDEX

TABLE OF CASES

* Cases and authorities chiefly relied upon are marked by asterisks.

OTHER REFERENCES

* Cases and authorities chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was the Government required to prove the motive for the abduction as an essential element of the crime of kidnapping?

II. Should the testimony of the complaining witness have been corroborated in the same manner and degree as that of a complaining witness in a sex offense?

III. When the court at the time of sentencing made reference to certain prior criminal conduct in which appellant was allegedly involved, and neither appellant himself nor his trial counsel said anything to contradict or refute the court's statement, may appellant now assign as error the court's reference to this prior incident, particularly when his claim of error is based only on a representation made by appellant to his appellate counsel which is entirely outside the record?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,166

UNITED STATES OF AMERICA, *Appellee,*

v.

FRANKLIN D. SHEPPARD, JR., *Appellant.*

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed August 5, 1968, appellant was charged with kidnapping, 18 U.S. Code § 1201, and assault with a dangerous weapon, 22 D.C. Code § 502. On February 5, 1969, appellant went to trial in the District Court before Judge John H. Pratt. The jury, however, was unable to agree on a verdict, and a mistrial was declared. Appellant's second trial by jury began on April 7, 1969. He was found guilty as indicted on April 8. Appellant was sentenced on May 23, 1969, to five to fifteen years on count one and one to three years on count two, the terms to run concurrently. This appeal followed.

Francia Napier was a student at American University on May 28, 1968[1] (Tr. 4-5). She drove her automobile to the university that morning to attend her classes (Tr. 5, 34). The day was cloudy, and there was a slight drizzle (Tr. 5). Miss Napier was wearing a light spring dress, white stockings, white patent shoes, a navy blue trench coat and a white plastic rain hat (Tr. 5). After her classes she returned to her automobile, but she "was having trouble with it" (Tr. 34), so she left it and walked to the bus stop at New Mexico and Nebraska Avenues to catch a bus (Tr. 6, 34). She arrived at the bus stop between 1:35 and 1:40 p.m. (Tr. 6). There was no one else at the bus stop, no vehicles at the intersection, and no people on the street in the immediate area (Tr. 7, 37).[2]

A dark green auto stopped in front of Miss Napier as she stood waiting for her bus. The driver, whom she had never seen before (Tr. 8, 32, 48) and whom she later unequivocally identified as appellant (Tr. 30), pointed a gun at her through the partially open window and directed her to "get in" (Tr. 7). She complied with his order, entered the car and sat on the passenger's side of the front seat (Tr. 8). Then she was told to roll up the window, and appellant drove off (Tr. 8). Miss Napier asked appellant where he was taking her and what he was going to do, but he only replied, "Keep quiet" (Tr. 10).

As appellant continued to point the gun at Miss Napier, he proceeded to drive into Virginia. They eventually arrived in the area of Morrisville, Virginia, fifty miles from the District of Columbia, at about 3:10 p.m. (Tr. 12-16).[3]

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[1] Miss Napier was twenty years old at the time of appellant's second trial (Tr. 50). Consequently, she would have been about nineteen on May 28, 1968.

[2] Miss Napier's description of the pedestrian and automobile traffic at this intersection at this time was consistent with the later testimony of Metropolitan Police Lieutenant Robert DeMilt, who stated that in his experience the traffic there is "light to medium" at about 1:45 p.m. (Tr. 82).

[3] Miss Napier was able to relate precisely the route over which they traveled (Tr. 9-14). She explained that she was familiar with these roads and highways because of prior bus trips over them to Roanoke, Virginia, and she saw the road markers (Tr. 14, 35). She further explained that she memorized the numbers of the roads because she thought this information would be helpful to the police (Tr. 45-46).

Shortly after appellant began driving, he pulled off the road at the intersection of Arizona Avenue and Canal Road (Tr. 10). He remained there for about one minute (Tr. 13) without speaking to Miss Napier (Tr. 10). There were automobiles at this intersection but no pedestrians (Tr. 13, 36).[4] Appellant stopped his automobile at several traffic lights during the journey (Tr. 12, 37). Miss Napier did not cry out or try to escape until they had traveled about fifty miles (Tr. 12, 37-38). When asked why she did not do so, she replied, "I was in a very emotional state at the time and I wasn't thinking" (Tr. 13). "I was in a rather emotional state having had a gun pointed in my face" (Tr. 38).[5]

Miss Napier had very little conversation with appellant during this trip.[6] She had a good opportunity to study appellant's face, and she memorized his features for the specific purpose of being able to describe him to the police (Tr. 15-16, 47-48). She noted that the automobile appellant was driving was a Plymouth Fury III with a black interior (Tr. 15, 27) and that there was a Virginia inspection sticker on the windshield with the number "9" on it (Tr. 26).

Miss Napier managed to escape from appellant at about 3:10 p.m. at a stop sign at an intersection with Virginia Route 17. She testified:

> We came to a stop sign at the intersection at Route 17 and we stopped and there was a tractor-trailer coming along Route 17. We came to a stop and the truck went on down the road and drifted into the intersection. I asked [appellant] for a cigarette and he took his arm

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[4] Miss Napier testified on cross-examination that she had no idea why appellant pulled off the road at this time (Tr. 36).

[5] Miss Napier also testified, "I might have [had an opportunity to escape from the automobile at the traffic lights], sir, I can't recall. I was in a very emotional state." (Tr. 37.)

[6] Miss Napier summarized her conversations with appellant as follows:

> When I first entered the car he told me to roll up the window. I started to ask him where we were going and he said, "Just keep quiet." He asked me if I wanted a cigarette and I said no. At one point I did ask him—I was hot and asked him if I could unbutton the top button of my raincoat. I had it buttoned up and I was a little bit hot and nervous. (Tr. 48-49.)

> away from the steering wheel and went into his pocket to get a cigarette. At that time I grabbed for the gun with my left hand and leaned over with my right and tried to pull up the door handle. I got the door partially open and started to grab my arm away and he grabbed my hand and grabbed the gun from me. At this time the door was partially open and we were crossing the intersection and I went ahead and rolled out of the car and ran across a muddy field up to Route 17 and I turned at that time and looked back and the car was still setting there with the door open. I ran across the route and through another field to a diner which I had seen earlier at the stop sign. I ran up to the diner and by this time I was very upset and started crying and I pounded on the glass and the lady from the diner came to the glass and I said, "Call the police." She took me inside the diner and sat me down and called the police. (Tr. 19-20.)

Miss Napier had her purse and rain hat with her in the car, but she made no effort to take them with her when she escaped (Tr. 21-22). At trial she identified Government Exhibits Nos. 3 and 4, respectively, as her rain hat and purse which she left in appellant's auto on the date of this offense (Tr. 23-26).[7]

A composite picture of appellant, based on Miss Napier's description, was made on May 30 by Lieutenant Robert DeMilt of the Metropolitan Police (Tr. 28-30).[8]

Jack Nelson, a detective with the Auto Squad of the Fairfax County Police Department, went to appellant's home in Virginia on May 31, 1968, and arrested him on a warrant for this offense (Tr. 54-55). At that time he also impounded appellant's automobile, a dark green 1968 Plymouth with a black interior (Tr. 55-56). Special Agent

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[7] Miss Napier's purse contained her personal check book with her name and address on it, her keys, and other items which she withdrew from the purse at trial and showed to the jury (Tr. 24-26).

[8] A photograph of this composite was introduced into evidence as Government Exhibit No. 5 during Lieutenant DeMilt's testimony (Tr. 63-67).

Harvey E. Wilkerson, of the Washington Field Office of Federal Bureau of Investigation, obtained a search warrant for appellant's automobile on May 31 after questioning Miss Napier (Tr. 56-58). The auto was a dark green 1968 Plymouth Fury III with a black interior (Tr. 58). This auto had a Virginia inspection sticker on the windshield with the number "9" on it (Tr. 59).

Agent Wilkerson also related that on June 25, 1968, it was arranged with the consent of appellant's attorney that appellant would sit in the audience at his hearing before the United States Commissioner, and Miss Napier would be asked if she could identify anyone in the hearing room as her abductor. This arrangement was carried out, and Miss Napier identified appellant from an audience of about 28 people (Tr. 60-62).

Miss Napier also testified at trial that in July 1968 she was taken by Lieutenant Lee of the Metropolitan Police to view an automobile parked on a city street in the District. Upon arrival at this location, Miss Napier was asked, "Do you see the car that the abductor used?" (Tr. 31). Her attention was not directed to any particular automobile. Miss Napier told Lieutenant Lee that she did see the auto. It was a green 1968 Plymouth Fury III with a black interior (Tr. 30-31).[9]

Mrs. Evelyn James, the owner of a drive-in restaurant in Morrisville, Virginia, near the intersection of Virginia Routes 17 and 634, testified that Miss Napier [10] appeared at her place of business at about 3:00 p.m. on May 28, 1968, and asked her to call the police (Tr. 88-90). Mrs. James said that Miss Napier was "crying and hysterical" and that her hair was wet (Tr. 91). Miss Napier related to Mrs. James what had occurred, and the latter summoned the police (Tr. 91).

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[9] However, as appellant correctly points out in his brief, there was never any testimony as to who owned this particular auto that Miss Napier identified in July 1968.

[10] Mrs. James testified that she did not remember Miss Napier's name (Tr. 91). However, she identified Miss Napier, who was in the courtroom, as the young lady who came to her restaurant on May 28 and asked for help (Tr. 92).

Donald Linwood Waddell was a prisoner of the State of Virginia and was working on a road gang in Stafford County, on Interstate Route 95 near Stafford, on the date of this offense (Tr. 96-99). Mr. Waddell testified at trial that on that day he found Miss Napier's purse, Government Exhibit No. 4, in the bushes beside the road (Tr. 98-99, 101-102). He also found a white rain hat at the same location and delivered both items to a road gang guard (Tr. 99).

The Government rested after Mr. Waddell's testimony, and appellant made a motion for judgment of acquittal, which was denied (Tr. 102-103). Thereafter appellant, by his counsel and in response to questions put to him by the court, advised the court that he had elected not to testify or to present any other evidence (Tr. 103-109). The defense then rested (Tr. 109). After arguments by counsel and instructions by the court, with which appellant expressed his satisfaction (Supp. Tr. 80-81),[11] appellant was found guilty as indicted.

ARGUMENT

I. It was not necessary for the Government to prove, as an essential element of the crime of kidnapping, the motive for the offense.

Appellant's argument that the Government must establish as an essential element of the offense of kidnapping the purpose of the offense reveals a misinterpretation of the Federal Kidnapping Act[12] and a misapprehension of the thrust of the case law construing that Act.[13]

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[11] "Supp. Tr." refers to the supplementary transcript containing the voir dire, arguments of counsel and the court's charge to the jury.

[12] 18 U.S.C. § 1201 provides in pertinent part:

> (a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished [as herein provided].

[13] Appellant's argument that the District Court erred in its instruction to the jury has been rendered moot by the Court's order of February 5, 1971, correcting the record. In pertinent part the corrected record indicates that the District Court's instruction coincides with the one referred to by appellant on page 16 of his brief.

As originally enacted, the Federal Kidnapping Act applied only if the kidnaped person was "held for ransom or reward."[14] In 1934 the statute was amended to extend its coverage to interstate transportation of kidnaped persons "held for ransom or reward *or otherwise*, except, in the case of a minor, by a parent thereof . . ." (emphasis added). The report of the Senate Judiciary Committee stated that the purpose of this amendment was to extend the statute's reach "to persons who have been kidnaped and held, not only for reward, *but for any other reason.*" S. REP. No. 534, 73d Cong., Sess. 1 (1934) (emphasis added). The House Judiciary Committee report contains an identical statement (followed by the exception of parent-child cases, which is related not to purpose but to the act of kidnapping itself). H.R. REP. No. 1457, 73d Cong., 2d Sess. 2 (1934).

In support of his argument appellant places great reliance on *United States* v. *Varner*, 283 F.2d 900 (7th Cir. 1961), and its predecessor, *United States* v. *Bazzell*, 187 F.2d 878 (7th Cir.), *cert. denied*, 342 U.S. 849 (1951). A slender reed when written, *Varner* has since broken completely under the weight of judicial authority and can no longer be relied upon as precedent.[15] Indeed, in the same year it was written, *Varner* was rejected as authority by the Ninth Circuit in *Dawson* v. *United States*, 292 F.2d 365, 366 (9th Cir. 1961). *See also Loux* v. *United States*, 389 F.2d 911, 916 (9th Cir. 1968).

Appellant cites *Gooch* v. *United States*, 297 U.S. 124 (1936), as holding that the purpose of a kidnapping is a material element of the offense. This is a tortured reading of *Gooch*. First of all, the Supreme Court in *Gooch* was construing for the first time the amendment added to the Federal Kidnapping Act in 1934. Act of May 18, 1934, ch. 301, 48 Stat. 781. The original Act in 1932 required that the transported person should be held "for ransom or reward." Informed by two years' experience, Congress undertook by the 1934 amendment to enlarge the scope of

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[14] Act of June 22, 1932, ch. 271, 47 Stat. 326.

[15] The same, of course, must also be said of *Bazzell*.

the Act and to clarify its purpose. The Court in *Gooch* was at pains to reject the contention that the words "ransom" and "reward" meant only pecuniary benefits, and that the doctrine of *ejusdem generis* similarly restricted the words "or otherwise." *Gooch* must be read as standing for the limited proposition that a nonpecuniary motive does not preclude prosecution under the statute.

Moreover, the illumination provided by *Gooch* can be seen only as refracted by subsequent cases, notably *United States* v. *Healy*, 376 U.S. 75 (1964); *Chatwin* v. *United States*, 326 U.S. 455 (1946); *DeHerrera* v. *United States*, 339 F.2d 587 (10th Cir. 1964); *United States* v. *Martell*, 335 F.2d 764 (4th Cir. 1964); *Davidson* v. *United States*, 312 F.2d 163 (8th Cir. 1963); *Clinton* v. *United States*, 260 F.2d 824 (5th Cir. 1958); and *Brooks* v. *United States*, 199 F.2d 336 (4th Cir. 1952). The Supreme Court in *United States* v. *Healy, supra*, held that the statute could be violated regardless of the ultimate purpose of the kidnapper and that an illegal purpose need not be shown. Appellant himself cites *Chatwin* v. *United States, supra*. Nowhere in *Chatwin*, however, does the Supreme Court define the "proscribed purpose" which appellant here seeks to make an essential element of the offense. The Court's holding that the statute could not be applied to "situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnapping" [16] clearly reveals that the Court did not consider any specific purpose essential to the offense. In *DeHerrera* v. *United States, supra*, the Tenth Circuit said that "[t]he use in the statute of the words 'or otherwise' shows an intent of Congress to include within the offense *any holding of a kidnaped person for a purpose desired by the captor* . . . ." 339 F.2d at 588 (emphasis added). The Fourth Circuit in *United States* v. *Martell, supra*, upheld an indictment which contained no language whatever regarding motive or purpose, and in *Brooks* v. *United States, supra*, the same court held it was not essential that the abduction and transportation of the

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[16] *Chatwin* v. *United States, supra*, 326 U.S. at 464. *See also United States* v. *Healy, supra*, 376 U.S. at 82 n.6.

victim be for ransom or reward or for any other benefit to the kidnapper. The Eighth Circuit in *Davidson* v. *United States, supra,* 312 F.2d at 166, made no reference to purpose in saying: "When the defendant enticed the six-year old child into his automobile and drove away with her, that, in our opinion, constituted an involuntary and illegal seizure and restraint, and brought his conduct within the Act." In *Clinton* v. *United States, supra,* 260 F.2d at 825, the Fifth Circuit held that the word " 'otherwise' comprehends any purpose at all."

In view of this weight of case law, appellant's contention that a charge of kidnapping cannot be sustained in the absence of any probative proof of purpose for the offense is patently without merit. His brusque rejection of *Gawne* v. *United States,* 409 F.2d 1399 (9th Cir. 1969), *cert. denied,* 397 U.S. 943 (1970), reveals the weakness of his argument, for *Gawne* in our view is controlling. The court there flatly held "that the kidnapper's motivation is not an element of the offense." 409 F.2d at 1403. Appellant's contention that the purpose of the abduction must be proved as an essential element of the offense of kidnapping is manifestly "without support in the language of the provision, its legislative history, judicial decisions or logic." *United States* v. *Healy, supra,* 376 U.S. at 82.[17]

II. The testimony adduced at trial was sufficient to sustain the conviction.

(Tr. 29, 41-43, 56-62, 91, 97-98)

Appellant, citing no authority, makes the argument that the requirement of corroboration to convict an accused of a sex offense is also applicable to a case like this one. His lack of supporting authority is indicative of its lack of merit. Appellant was charged with and convicted of kidnapping and assault with a dangerous weapon, neither of which is a sex offense. The repeated assertion that appellant's

[17] Since this brief was initially written, this Court has rendered its opinion in the case of *United States* v. *Wolford,* D.C. Cir. No. 24,110, decided March 25, 1971. It being inappropriate at this stage to rewrite our brief extensively, we would merely state that we view *Wolford* as dispositive of this issue.

motive was sexual assault is both speculative and irrelevant. It is speculative because the record is devoid of any evidence whatsoever relating to motive, as appellant himself points out in support of his first contention. It is irrelevant because motive is not an element of the crime of kidnapping which must be proved by the government.[18]

In any event, Miss Napier's testimony was amply supported by several corroborative facts. Her purse and plastic rain hat had been found in Stafford County, Virginia, at the edge of Interstate Route 95 on the same day as the offense (Tr. 97-98). She appeared at a diner operated by Mrs. Evelyn James, who testified that Miss Napier was upset and asked that the police be called (Tr. 91). She identified appellant in the office of the United States Commissioner on June 25, 1968, from an audience of about 28 people (Tr. 60-62). She identified a car resembling appellant's car (see footnote 9, *supra*) in July of 1968, two months after the abduction (Tr. 41-43). Clearly these are links "in a completely harmonious chain of events which in the aggregate gave strong support to the complainant's testimony in its entirety. Viewed, then, for what [they were, they] possessed corroborative force . . . ." *Borum* v. *United States,* 133 U.S. App. D.C. 147, 153, 409 F.2d 433, 439 (1967), *cert. denied,* 395 U.S. 916 (1969).

III. Having failed to offer any facts or to make any statement to refute the court's comment at sentencing with regard to his prior criminal conduct, appellant is not now entitled to this Court's consideration of his claim of error in the sentencing.

(Sent. Tr.)

Appellant goes far outside the record to make his final contention, and for that reason alone it should be rejected. This Court in the past has been emphatic in its disapproval of departures from the record in appellate argument. *E.g., Johnson* v. *United States,* D.C. Cir. No. 21,851, decided

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[18] See argument I, *supra*, and especially *DeHerrera* v. *United States*, *supra*, 339 F.2d at 588; *Davidson* v. *United States*, *supra*, 312 F.2d at 166.

June 20, 1969, slip op. at 9-10, *reaffirmed en banc*, 138 U.S. App. D.C. 174, 179 n.1, 426 F.2d 651, 656 n.8 (1970), *cert. dismissed as improvidently granted*, 401 U.S. —— (1971); *Suggs* v. *United States*, 132 U.S. App. D.C. 337, 341 n.5, 407 F.2d 1272, 1276 n.5 (1969). A distinguished committee of the American Bar Association under the chairmanship of the Chief Justice of the United States has also commented forcefully on the matter:

> An appellate court's function is limited to review of what took place in the trial court. In an appellate court a lawyer must take the case as it was tried and on that record alone. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *The Defense Function* § 8.4 (c), at 304 (Tent. Draft 1970).

Appellant's third argument is based apparently on a representation made by appellant to his appointed counsel, totally unsupported by anything in the record.[19] Appellant's alleged denial of involvement in the prior incident, having never been presented to the District Court or subjected in any way to the rigorous scrutiny of the adversary process, should at the very least be totally disregarded by this Court.[20]

We further submit that appellant has waived whatever right he may have had to relief by failing to offer any

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[19] We refer here to the first five lines in the first full paragraph on page 29 of appellant's brief, beginning with the word "Contrary," together with footnote 21 at the bottom of that page. Counsel at least is candid in acknowledging that these statements were made to him by appellant, but such candor is not sufficient to justify their consideration by this Court. An affidavit of the sort proposed in the footnote would be equally improper, and we would vigorously oppose its submission to this Court (without prejudice, of course, to its submission to the District Court in an appropriate manner).

[20] Appellant is not without a remedy. If he feels that he has been unjustly treated or that factually inaccurate matter has been improperly considered by the District Court in its imposition of sentence, *see Townsend* v. *Burke*, 334 U.S. 736 (1948), he is free to seek appropriate relief *in that court—e.g.*, reduction of his sentence under Rule 35, FED. R. CRIM. P. All that we are saying is that the District Court is the only proper forum for litigating such matters in the first instance. (We are not, of course, indicating our views on the merits of any such motion, nor should what we say here be construed as an acknowledgment of either the truth or the legal efficacy of appellant's allegations.)

comment in response to the remarks of the trial judge at the sentencing hearing. When appellant came before the court for sentencing, the court made the following observations:

> THE COURT: Mr. Sheppard, there is a full probation report. There is an indication that you were involved in the same kind of conduct as the conduct for which you were convicted which happened in December of 1967, also involving the forcing of a young girl, in this case at knife point, into your car and taking her to Virginia.
>
> Under the circumstances, we don't have much alternative. (Sent. Tr. 2.)

Neither appellant nor his attorney [21] made any response to these remarks, and the court then proceeded to impose sentence. In our view it was incumbent on appellant *at that time* at least to raise his voice in protest at the alleged inaccuracy of the court's statement if in fact it was inaccurate. Having failed to do so, we submit, appellant has waived any claim of entitlement to relief at the hands of this Court.[22]

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[21] Appellant's suggestion that his trial counsel was ineffective (Brief for Appellant at 31) is patently insubstantial, particularly in the absence of any showing that counsel had knowledge of the prior incident which he withheld from the court. *See Scott* v. *United States*, 138 U.S. App. D.C. 339, 427 F.2d 609 (1970); *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967). Curiously, appellant elsewhere in his brief expressly disclaims any contention that his trial counsel was ineffective (Brief for Appellant at 19 and n.11). With respect to the point made in footnote 11 of appellant's brief, *compare Matthews* v. *United States*, D.C. Cir. No. 21,798, decided March 4, 1971, *with United States* v. *Hammonds*, 138 U.S. App. D.C. 166, 425 F.2d 597 (1970).

[22] In any event, we submit that information provided by the FBI may properly be considered by a sentencing court as the sort of "responsible unsworn or 'out-of-court' information relative to . . . the convicted person's life and characteristics" of which the Supreme Court spoke in *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959). *See generally Williams* v. *New York*, 337 U.S. 241 (1949). We note that appellant's sentence of five to fifteen years was appreciably less than the maximum allowable under the statute: life imprisonment. *See* 18 U.S.C. § 1201(a).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
GREGORY C. BRADY,
Assistant United States Attorneys.

☆ U.S. Government Printing Office: 1971—421-638/566

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the trial court erred in granting the Government's motion to correct the record?
2. Whether the trial judge erred in failing to hold a hearing *sua sponte* on the Government's motion to correct the record or to refer it to another judge for a hearing?

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* This case is currently before this Court on direct appeal from appellant's conviction, No. 23,166, which was consolidated with the instant appeal by order dated March 10, 1971.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1151

UNITED STATES OF AMERICA, APPELLEE

v.

FRANKLIN D. SHEPPARD, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a two-count indictment filed August 5, 1968, with kidnapping, in violation of 18 U.S.C. § 1201, and assault with a dangerous weapon, in violation of 22 D.C. Code § 502. Appellant's first jury trial on February 5, 1969, concluded in a mistrial due to the jury's inability to agree on a verdict. After a second jury trial before the Honorable John H. Pratt on April 7 and 8, 1969, appellant was found guilty as charged. Appellant was sentenced on May 23, 1969, to terms of imprisonment of five to fifteen years on the first count and one to three years on the second count,

to run concurrently. Notice of appeal was filed on May 28, 1969. In due course the appeal was docketed in this Court as No. 23,166, and briefs were filed with this Court. The testimony of the witnesses at trial is set out in detail in the Government's brief in No. 23,166, which was consolidated with the instant appeal by order dated March 10, 1971.

On June 16, 1970, the government filed with the trial court a motion to correct the record pursuant to Rule 10 (e) of the Federal Rules of Appellate Procedure (Appendix, *infra*, pp. 11-12). It alleged that the court reporter had "incorrectly transcribed [that] . . . portion of the . . . court's instructions to the jury on the offense of kidnapping" (Appendix, *infra*, p. 11). The disputed portion of the instruction, as transcribed, was as follows:

> Kidnapping need not be [*sic*] necessarily be for ransom, reward or other pecuniary reason, or any reason whatsoever. (S. Tr. 79.)[1]

Appended to the motion was an affidavit by the prosecutor who represented the Government at the trial to the effect that the court had instructed the jury thus:

> Kidnapping need not necessarily be for ransom, reward or other pecuniary benefits *but may be for* any reason whatsoever. (Appendix, *infra*, p. 13) (emphasis added).

The prosecutor based his affidavit on his recollection of the trial as well as his examination of a copy of the written instruction which had been prepared by the trial judge for delivery in this case (Appendix, *infra*, pp. 13-14).

On July 6, 1970, appellant filed an opposition to the government's motion to correct the record in which he questioned the prosecutor's ability to remember what occurred during the trial (Appendix, *infra*, pp. 17-19). Appellant also submitted a counter-affidavit from Mrs. Martha Jane Maloney, the court reporter at the instant

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[1] The supplemental transcript containing the trial court's charge to the jury is hereinafter referred to as "S.Tr."

trial, in which she declared that before preparing the transcript she had compared her shorthand notes with a tape recording of the proceedings and that they were both identical. However, she added that she no longer had the tapes in her possession. She also contended that it would not have been possible for her to make the error in question because it "would have required the commission of errors which are very unusual in the Gregg system" (Appendix, *infra*, p. 20).

On February 5, 1971, the trial court granted the Government's motion to correct the transcript (Appendix, *infra*, pp. 22-23). The court stated in its Findings, Conclusions, and Order (1) that it had "checked its prepared jury instructions for this case" and found them to conform to the correction requested by the Government; (2) that it was taking "judicial notice of the fact that other problems regarding Mrs. Maloney's transcripts have arisen in other cases"; and (3) that the tape recordings referred to in the court reporter's affidavit were no longer in existence (Appendix, *infra*, p. 22). This appeal is taken from the trial court's order granting the government's motion.

ARGUMENT

I. The trial court did not err in granting the government's motion to correct the record.

Appellant contends that the trial court erred in granting the government's motion to correct the record because the government failed to sustain its burden of proving that the court reporter had made an error in her transcription of the disputed sentence in the kidnapping instruction. We disagree.

Although 28 U.S.C. § 753 (b) provides that a "transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had," provisions have been specifically created for the correction of any error or omission.

Rule 10 (e) of the Federal Rules of Appellate Procedure provides:

> If any difference arises as to whether the record truly discloses what occurred in the district court, the difference *shall be submitted to and settled by that court* and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein . . . the district court either before or after the record is transmitted to the Court of Appeals . . . *may direct that the . . . misstatement be corrected* . . . . [Emphasis added.]

Pursuant to that rule, the Government properly filed a motion to correct a material error in the transcript. Having made numerous unsuccessful attempts to locate the court reporter in order to have her check her notes and tape recordings, the government submitted an affidavit from the prosecutor at trial in support of its motion. In it he stated his recollection that the trial court had specifically instructed the jury that in order to find appellant guilty of kidnapping it had to find that the kidnapping was done "for any reason whatsoever."[2] He explained that he had also "examined a copy of the written instruction which the trial judge prepared" and had found that four crucial words had been omitted by the reporter (Appendix, *infra*, p. 13).

By filing an opposition with a counter-affidavit by the court reporter, appellant placed the case squarely before the trial judge to decide whether in fact the reporter had made such an error. We submit that the reporter's affidavit was insubstantial and did not in any way rebut the prosecutor's affidavit that her transcription of the

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[2] We submit that appellant's present counsel, who did not represent him at trial, is in no position to question the "remarkable memory" of the Assistant United States Attorney at trial who based his affidavit on his recollection as well as on his trial notes and the court's prepared jury instructions. We find it significant that appellant's trial counsel did not file any affidavit in support of appellant's position.

language in question was erroneous. In fact, it was only a conclusory statement, without any supporting evidence, that she could not have possibly been wrong. Her affidavit states that after comparing her notes with the transcript, she found them to be accurate (Appendix, *infra*, p. 20). But certainly, if her original shorthand notes taken at the time of the charge to the jury were incorrect, then the whole premise on which her affidavit rests is erroneous. Similarly, although she states that she compared her shorthand notes with a tape recording of the proceedings and found them to conform to one another, she acknowledged that this tape recording was no longer in existence and that there was, therefore, nothing to prove her representation. Finally, appellant relies on her statement that the corrections requested by the Government "would have required the commission of errors which are very unusual in the Gregg [shorthand] system" (Appendix, *infra*, p. 20). It is interesting to note, however, that she did not state that it was *impossible* to make these errors but merely that it was *unusual* to do so. Moreover, the *omission* of certain words, as distinguished from a mere incorrect transcription, could have occurred regardless of what shorthand system she used.[3] Thus there was nothing of substance in her affidavit which required rebuttal on the part of the government.

We further submit that since the issue before the trial judge involved a determination of the wording of

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[3] A reading of the sentence in question indicates a strong possibility that the error was due to some inadvertence or confusion on the court reporter's part. She transcribed the instruction as:

> Kidnapping need not be [*sic*] necessarily be for ransom, reward or other pecuniary reason, or any reason whatsoever. (S. Tr. 79.)

instead of:

> Kidnapping need not necessarily be for ransom, reward or other pecuniary *benefits but may be for any* reason whatsoever. (Appendix, *infra*, p. 25) (emphasis added).

As can be seen, the italicized words are such that they could easily be inadvertently omitted when one is taking notes under the pressure of the courtroom.

the instruction he had in fact given to the jury, it was proper for him to refer to the written notes which had been specifically prepared for this particular case. (See Appendix, *infra*, pp. 24-25.) He could also consider any other relevant information of which he had personal knowledge.[4] *Gagnon* v. *United States*, 193 U.S. 451, 458 (1904). *See also American Trucking Ass'ns* v. *Frisco Co.*, 358 U.S. 133, 145 (1958); *Buie* v. *King*, 137 F.2d 495, 498 (8th Cir. 1943). Thus it was proper for the trial court to take "judicial notice of the fact that other problems regarding Mrs. Maloney's transcripts have arisen in other cases" (Appendix, *infra*, p. 22).[5]

We submit that the Government's unchallenged affidavit, when considered with the copy of the jury instruction which the court specifically prepared for the case at bar and the facts of which the trial court took judicial notice, was sufficient to warrant the correction of the transcript.[6]

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[4] Although appellant contends at page 13 of his brief that "the court chose not to rely upon the basic allegation set forth in the Government's motion," this statement is totally unsupported by the record. The trial court's Findings, Conclusions, and Order makes clear that the court had read the Government's motion as well as appellant's opposition and supporting affidavit and in addition lists the other factors which it took into consideration before arriving at a decision (Appendix, *infra*, pp. 22-23).

[5] As the record discloses (Appendix, *infra*, pp. 20, 22), Mrs. Maloney is no longer employed as a court reporter by the District Court. Although the reasons for the termination of her employment are not revealed by the record, we think it may reasonably be inferred, in the context of this case, that the "problems" to which the trial judge refers were a contributing factor in her departure from such employment.

[6] Appellant's argument that since the trial judge departed from his prepared instruction in other places, it should be assumed that he changed the wording of the disputed sentence as well, is without foundation. As the trial judge pointed out in his order (Appendix, *infra*, p. 22), the very fact the sentence in question had a "central position [in] this particular instruction" would indicate that if anything he gave special attention to it.

II. The trial judge was not required either to hold a hearing *sua sponte* on the government's motion to correct the record or to refer it to another judge for a hearing.

Appellant contends that the trial judge erred in failing to hold a hearing on the Government's motion or to refer the case to another judge for such a hearing. We submit that a hearing was not necessary under the circumstances of this particular case. *Calomeris* v. *United States*, 95 U.S. App. D.C. 239, 240, 221 F.2d 111, 112 (1955); *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 19, 135 F.2d 633, 638 (1942), *cert. denied*, 318 U.S. 776 (1943); *United States* v. *Troche*, 213 F.2d 401, 402 (2d Cir. 1954); *see United States* v. *On Lee*, 201 F.2d 722, 723 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953).[7] In the instant case the trial court made it clear that in making the correction it was also relying on pre-existing written documentation—the jury instruction on kidnapping which it had prepared *for this case*. *Cf. Gagnon* v. *United States*, *supra*; *In re Wright*, 134 U.S. 136, 143 (1890). It should also be pointed out that at no time did appellant, either in his petition for deferral of action filed on June 29, 1970 (Appendix, *infra*, pp. 15-16), or in his opposition to the motion to correct the record (Appendix, *infra*, pp. 17-19), request either that the trial judge hold a hearing or that he recuse himself. His complaint now comes too late. *Cf. United States* v. *Troche*, *supra*. *Compare Lyles* v. *United States*, 272 F. 2d 910, 913 (5th Cir. 1959), in which no hearing was

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[7] *Kennedy* v. *Reid*, 101 U.S. App. D.C. 400, 249 F.2d 492 (1957), and *Gilliam* v. *United States*, 106 U.S. App. D.C. 103, 269 F.2d 770 (1959), cited by appellant, are inapposite. Both cases involved correction of a *sentence* without a hearing. In *Kennedy* this Court affirmed the correction of a mistake in the sentence even though it was done in the absence of the defendant. In *Gilliam* this Court remanded the case for a hearing "simply because the prisoner has filed an artless, *pro se* motion" and because it was possible that at a later hearing, with proper representation, he might be able to submit contrary evidence. 106 U.S. App. D.C. at 106, 269 F.2d at 773.

held even though both parties had specifically requested one.

Furthermore, neither Rule 10 (e) of the Federal Rules of Appellate Procedure nor the cases interpreting it require that *any* hearing be held, either by the same judge or by another judge. Rule 10 (e) simply provides that the trial court shall rule on a motion to correct or modify the record. *See Belt* v. *Holton*, 90 U.S. App. D.C. 148, 150, 197 F.2d 579, 581 (1952); *Miller* v. *Miller*, 72 App. D.C. 348, 114 F.2d 596 (1940). The fact that the trial judge's ruling on the present motion was heavily based on his own written memoranda, copies of which had apparently been supplied to trial counsel in the course of the trial, eliminates the need for any hearing. This is not a case where the trial judge relied upon his mere unaided recollection of what he had told the jury, thus making it necessary to subject him to cross-examination. *Compare Downey* v. *United States*, 67 App. D.C. 192, 91 F.2d 223 (1937).[8] We therefore submit that the trial judge was not required either to hold a hearing or to recuse himself and refer the motion to another judge.[9]

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[8] In *Downey* the judge had specifically relied upon his recollection in correcting the record of the sentencing, and this Court declared that a hearing should have been held before another judge so that the sentencing judge might be called as a witness and subjected to cross-examination.

[9] We would also point out that the fact that trial counsel did not interpose any objection when the kidnapping instruction was given strongly suggests that the court did in fact give the proper instruction.

CONCLUSION

WHEREFORE, appellee respectfully submits that the order of the District Court granting appellee's motion to correct the record should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
GREGORY C. BRADY,
RAYMOND BANOUN,
Assistant United States Attorneys.

APPENDIX

[Filed June 16, 1970]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIM. No. 1192-68

UNITED STATES OF AMERICA

v.

FRANKLIN D. SHEPPARD, JR.

MOTION TO CORRECT RECORD

The United States respectfully moves, pursuant to Rule 10 (e) of the Federal Rules of Appellate Procedure, that the supplemental transcript of proceedings on April 7 and 8, 1969, prepared by Martha Jane Maloney, formerly an official court reporter of this Court, be corrected as hereinafter set forth.

In preparation of its brief in response to the defendant's appeal from his conviction to the United States Court of Appeals for the District of Columbia Circuit, the United States discovered that Mrs. Maloney, the court reporter who recorded part of the defendant's trial, appears to have incorrectly transcribed a portion of this Court's instructions to the jury on the offense of kidnapping. We have repeatedly tried to get in touch with Mrs. Maloney to request her to check her notes against the transcript, but our efforts to reach her have been unsuccessful.

The supplemental transcript reflects at page 79 that this Court instructed the jury as follows:

> Kidnapping need not be necessarily be for ransom, reward or other pecuniary reason, or any reason whatsoever.

We believe that this Court actually instructed the jury on this matter as follows:

> Kidnapping need not necessarily be for ransom, reward or other pecuniary benefits, but may be for any reason whatsoever. (See attached affidavit filed in support of this motion).

Therefore, pursuant to Rule 10 (e), F. R. A. P., the United States respectfully moves that the transcript be corrected to read as we believe this Court actually instructed the jury on this point.

WHEREFORE, it is respectfully submitted that this motion be granted.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

/s/ John A. Terry
JOHN A. TERRY
Assistant United States Attorney

/s/ Gregory C. Brady
GREGORY C. BRADY
Assistant United States Attorney

[Certificate of Service Omitted]

[Filed June 16, 1970]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIM. No. 1192-68

UNITED STATES OF AMERICA

v.

FRANKLIN D. SHEPPARD, JR.

AFFIDAVIT

I, NICHOLAS S. NUNZIO, being duly sworn, hereby deposes and says

I was the Assistant United States Attorney who prosecuted Franklin D. Sheppard, Jr., on April 7 and 8, 1969, before United States District Judge John H. Pratt for the offenses of kidnapping and assault with a dangerous weapon. I have examined the supplemental transcript in this case, and I have found at page 79 that the court reporter transcribed a portion of the trial judge's instructions to the jury on the offense of kidnapping to read as follows:

> Kidnapping need not be necessarily be for ransom, reward or other pecuniary reason, or any reason whatsoever.

The above is not an accurate recording of the trial judge's instructions on this point. It is my recollection that the judge actually instructed the jury as follows:

> Kidnapping need not necessarily be for ransom, reward or other pecuniary benefits, but may be for any reason whatsoever.

I have examined a copy of the written instruction which the trial judge prepared for reading to the jury, and I

find that the judge's prepared instruction conforms to my recollection.

/s/ Nicholas S. Nunzio

Subscribed and sworn to by Nicholas S. Nunzio, Assistant United States Attorney, before me this 16th day of June, 1970.

/s/ [Illegible]
Notary Public, D.C.

[Filed June 30, 1970]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 1192-68

Case No. 23,166

UNITED STATES OF AMERICA

v.

FRANKLIN D. SHEPPARD, JR.

PETITION FOR DEFERRAL OF ACTION

Franklin D. Sheppard, Jr., appellant in the above-captioned case, hereby requests, by his attorney, that further action on the "Motion to Correct Record" (Motion), filed by the United States Attorney on the 16th of June, 1970, be deferred pending the filing of an affidavit by the official court reporter, Mrs. Martha Jane Maloney, concerning the accuracy of the transcript in question.

The U.S. Attorney's Motion alleges that the official transcript of the District Court proceeding inaccurately depicts a material portion of this Court's instructions to the jury and states that he has been unable to reach Mrs. Maloney in order to verify her account of the proceeding.

Counsel for Mr. Sheppard, upon learning of the alleged inaccuracy in the transcript, have made extensive efforts (including, *inter alia*, a trip to the former residence of Mrs. Maloney, calls to her friends and acquaintances in several different states, personal interviews with people who have known her, and a tour of four horse stables—and calls to 12 more—in Prince Georges County) to locate both the notes on which the official transcript was based and to locate Mrs. Maloney, who took the notes and transcribed them. As a result of these efforts, Mrs.

Maloney was found and, late Friday afternoon, June 26, 1970, was informed of the allegations made by the Government. She checked her trial notes to determine if any error had been made as alleged in the affidavit of the Assistant United States Attorney and has advised undersigned counsel that she has found none. An affidavit by Mrs. Maloney about this matter is being prepared and will be filed with this court at the earliest possible time.

Wherefore, counsel for Mr. Sheppard respectfully requests that further action concerning the "Motion to Correct Record" be deferred until the affidavit of Mrs. Maloney and an opposition to the Government's request can be filed.

Respectfully submitted,

/s/ Rainer K. Kraus
RAINER K. KRAUS

/s/ George Y. Wheeler
GEORGE Y. WHEELER
Counsel for
Franklin D. Sheppard, Jr.

Koteen & Burt
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

June 29, 1970

[Certificate of Serviec Omitted]

[Filed July 6, 1970]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 1192-68

Case No. 23,166

UNITED STATES OF AMERICA

v.

FRANKLIN D. SHEPPARD, JR.

OPPOSITION TO MOTION TO CORRECT RECORD

1. Franklin D. Sheppard, Jr., appellant in the above-captioned case, hereby requests, by his attorneys, that the "Motion to Correct Record" (Motion) of the U.S. Attorney dated June 16, 1970, with regard to the fourth full paragraph of page 79 of the Supplemental Transcript in the above-entitled case, be denied.

2. The U.S. Attorney's Motion alleges that the official transcript of the District Court proceeding inaccurately depicts a material portion of this Court's instructions to the jury. The only evidence submitted of the inaccuracy alleged by the U.S. Attorney is an affidavit of Nicholas S. Nunzio, Government counsel who prosecuted in the trial below, who states that it is his personal "recollection" that this Court's instruction, as actually delivered, differs with that reported in the official transcript.[1]

3. At the outset, we are constrained to note that it is difficult to imagine how, after more than 14 months, anyone can state positively, based on his "recollection," that the specific words reported to have been used by another person during the course of lengthy (14 pages)

[1] The affidavit states that this "recollection" has been found to conform to written instructions which had been prepared by the Court. In fact, the "recollection" is a precise, word for word, restatement of those written instructions.

instructions, the recitation of which would be of limited interest to either counsel since they would already have a chance to review them, are inaccurate. It is equally difficult to imagine how Mr. Nunzio could recall all of the actual words allegedly used, particularly when some of the differences between the reported language and "recollected" language are extremely subtle. For example, defense counsel for Mr. Sheppard at that trial below has advised undersigned counsel that he frankly cannot recall the specific language at issue here. His inability to recall verbatim this Court's lengthy instructions is, we submit, not only understandable but to be expected. On this basis alone, we submit that this affidavit is entitled to little, if any, weight even in the absence of the evidence discussed hereafter.

4. The Government appears to suggest that the Nunzio affidavit is submitted and relied upon by it because it had been unable to locate the official court reporter, Mrs. Martha Jane Maloney, who prepared the Supplemental Transcript in this case, in order to request that she check her notes. (Motion, p. 1.) However, as mentioned in our "Petition for Deferral of Action," filed with this Court on June 29, 1970, undersigned counsel for Mr. Sheppard subsequently located Mrs. Maloney and asked her to check her trial notes to determine if the error alleged in Mr. Nunzio's affidavit was made. She advised undersigned counsel at that time that she had found no error and has now supplied counsel with her affidavit confirming the accuracy of the transcription in question. A copy of Mrs. Maloney's affidavit, which is attached, explains the careful manner in which the official transcript was prepared, describes the verification of the official transcript and her trial notes against a tape recording of the trial which was made simultaneously by her, and points out the unlikelihood that errors claimed by the Assistant U.S. Attorney could have been made, even if she had used no verification procedure. Her conclusion that the portion of the official transcript in question is accurate and that the version of the transcript

"recollected" by Mr. Nunzio is not accurate is dispositive.

5. Finally, as noted above, the written instructions which had been prepared by this Court do conform to the language set forth as Government counsel's recollection and, in all probability, this Court intended to give such instructions to the jury. It is quite apparent, however, that this Court varied from the language of its prepared instruction both with regard to the point at issue here, as the official court reporter has verified, and elsewhere in the instructions. It hardly needs saying that the record on appeal must necessarily be, as far as possible, a verbatim record of what the court reporter and the jury heard, and not on the obviously interested 14-month-old "recollection" of Government counsel about what transpired.

6. Wherefore, counsel for Mr. Sheppard respectfully request, on the basis of the insubstantiality of the showing made by the Government and the unqualified verification of the transcript by the official court reporter, that the Government's "Motion to Correct Record" be denied.

Respectfully submitted,

/s/ Rainer K. Kraus
RAINER K. KRAUS

/s/ George Y. Wheeler
GEORGE Y. WHEELER
Counsel for
Franklin D. Sheppard, Jr.

Koteen & Burt
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

July 6, 1970

[Certificate of Service Omitted]

[Filed July 6, 1970]

AFFIDAVIT

1. My name is Martha Jane Maloney. I was the official court reporter in the case of *United States of America* vs. *Franklin D. Sheppard, Jr.*, Criminal No. 1192-68, and prepared the supplemental transcript covering proceedings in the case on the days of April 7 and April 8, 1969—a portion of which time was consumed by the Honorable John H. Pratt's instructions to the jury.

2. I prepared the official transcript from my own Gregg shorthand notes and a tape recording of the proceeding which I made. At the time I transcribed my notes, I checked each portion of my transcription against the tape, in order to make my transcription as accurate as possible. Although I no longer have the tape, I still have my notes.

3. I have been advised by appellate counsel for Mr. Sheppard that the Government now suggests that there was an error in my transcription of the fourth full paragraph on Page 79 of the supplementary transcript in question. I have reviewed the version of this paragraph now alleged by the Government to have been used by Judge Pratt and the version which is set forth in the official transcript against my shorthand notes for that day. My notes clearly show that the paragraph was precisely as set forth in my official transcript, namely:

> "Kidnapping need not be necessarily be for ransom, reward or other pecuniary reason, or any reason whatsoever."

The Government's contention, that the sentence was: "Kidnapping need not necessarily be for ransom, reward or other pecuniary benefits, but may be for any reason whatsoever" is not only significantly different from the wording shown in my notes but would have required the commission of errors which are very unusual in the Gregg system.

4. The foregoing statements are true and are based on my personal knowledge.

Respectfully submitted,

/s/ Martha Jane Maloney
MARTHA JANE MALONEY
Official Court Reporter

Subscribed and sworn to before me this 27 day of June, 1970.

/s/ [Illegible]
Notary Public
My Commission expires on July 1, 1974.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1192-68

UNITED STATES OF AMERICA

v.

FRANKLIN D. SHEPPARD, JR.

FINDINGS, CONCLUSIONS, AND ORDER

Findings

1. Franklin D. Sheppard, Jr. was tried before this Court on April 7 and 8, 1969 for kidnapping and assault with a dangerous weapon.

2. At the close of the trial the jury was given numerous instructions, including several on kidnapping.

3. One portion of those instructions was recorded at page 79 of the transcript by the reporter as follows:

> "Kidnapping need not be necessarily be for ransom, reward or other pecuniary reason, or any reason whatsoever."

The quoted portion was a key instruction as to the elements of the charge of kidnapping.

4. After the filing by the Government of a Motion to Correct the Record as to this instruction, the Court checked its prepared jury instructions for this case.

5. The Court has read Mrs. Maloney's affidavit to the effect that she has checked her trial notes, that she finds the transcription to be as originally reported, and that the errors alleged would be difficult to make. The Court takes judicial notice of the fact that other problems regarding Mrs. Maloney's transcripts have arisen in other cases. The Court also notes that the tape recording of the proceedings in question is no longer extant.

Conclusions

1. Upon comparing the transcript and the prepared instructions and keeping in mind the central position this particular instruction had in the trial, the Court concludes that the reporter's transcript is in error.

2. The Court's actual instruction on this point which was a part of the prepared instructions was as follows:

> "Kidnapping need not necessarily be for ransom, reward or other pecuniary benefits, but may be for any reason whatsoever."

ORDER

WHEREFORE, it is hereby ordered that the Government's motion to correct the record in this case be granted as set forth above.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

February 5, 1971

KIDNAPPING—FEDERAL

The first count of the indictment charges the offense of kidnapping. Kidnapping is a violation of Section 1201 —Title 18, Section 1201 of the United States Code. I will read you in pertinent part what the Code says on this subject.

"Whoever knowingly transports in interstate or foreign commerce any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away and held for ransom or reward or otherwise, except in the case of a minor by a parent thereof, shall be punished as provided by law."

The first count charges on or about May 28, 1968, within the District of Columbia, defendant Franklin D. Sheppard, Sr. did knowingly and willfully transport in interstate commerce from the District of Columbia to the State of Virginia one Francia Napier who had theretofore been unlawfully seized, confined, kidnapped, abducted, carried away and held by the said Franklin D. Sheppard, Sr. for ransom, reward or otherwise; to-wit, for the purpose of assaulting the said Francia Napier.

Now, the essential elements of the offense of kidnapping are set forth in Section 1201, Title 18 of the United States Code and are the following. Each of these elements the Government must prove beyond a reasonable doubt.

One, that the defendant transported or aided or abetted or caused the transportation of a person in interstate commerce as charged in the indictment. In connection with this element of the offense, you are instructed that a person is transported in interstate commerce whenever he is transported across a state line, from one state to another, or from the District of Columbia to another state. In other words, you must find the victim of the alleged offense was transported across a state line. For the purpose of this element of the offense, the border of

the District of Columbia and the neighboring State of Virginia is a state line.

The second essential element is that the defendant transported such person, Francia Napier, in interstate commerce knowingly and willfully. An act is knowingly done if it is done voluntarily and intentionally and not because of mistake or accident or other unknown reasons. An act is done willfully if it is done voluntarily and intentionally, with specific intent to do something the law forbids; that is to say, for bad purpose or to disobey or disregard the law.

The third essential element is that the defendant transported Francia Napier in interstate commerce while Francia Napier was unlawfully seized or confined or inveigled or kidnapped or carried away or held for ransom, reward or otherwise. Unlawfully means contrary to law. To kidnap means forcibly or unlawfully to abduct or steal away or carry away a person and to detain him against his will. To inveigle means to lure away or entice or lead away by false representations or promises or other deceitful means.

You must find involuntariness or coercion in connection with the victim seized and detention. Such coercion must be done with the willful intent to confine the victim and it may be achieved by mental as well as physical means. Kidnapping need not necessarily be for ransom, reward or other pecuniary benefits, but may be for any reason whatsoever.

U.S. v. *Franklin D. Sheppard, Sr.* Cr. No. 1192-68

February 6, 1969

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1151

Crim. No. 1192-68

UNITED STATES OF AMERICA, Appellee

v.

FRANKLIN D. SHEPPARD, JR., Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

George Y. Wheeler

1000 Vermont Avenue, N. W.
Washington, D. C. 20005

Counsel for Appellant
(Appointed by this Court)

November 24, 1971

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TABLE OF CASES

OTHER AUTHORITIES:

* Cases chiefly relied on are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1151

Crim. No. 1192-68

UNITED STATES OF AMERICA, Appellee

v.

FRANKLIN D. SHEPPARD, JR., Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Response to Brief for Appellee

Argument

I

The Government's assertion that the affidavit of the prosecutor in the trial below, the prepared jury instructions alluded to by the District Court (Findings, para. 4) and the alleged "problems" with the court reporter's transcripts in other cases of which the District Court took judicial notice (Findings, para. 5) should be sufficient to sustain the District Court's order correcting the record of the jury instructions concerning kidnapping is clearly in error.

Since the Government's brief does not contradict the authorities which we cited concerning the burden of proof applicable to its motion to correct the record, it has conceded that proof beyond a reasonable doubt is the appropriate standard. Viewed in this light, the Government's argument that it has sustained this burden is less than persuasive, as we previously discussed in our "Supplementary Memorandum for the Appellant," filed April 30, 1971.

The Government now seeks to strengthen the basis for the trial court's order granting the Government's motion by attempting to undercut the facts and materials which we presented to the District Court and by attempting to support the District Court's reliance on its

prepared jury instructions and the so-called "problems" with the court reporter's transcripts in other (unspecified) cases of which it purported, without prior notice to appellant, to take judicial notice. We submit that these efforts, however, are completely ineffectual, first, because affirmative support for a grant of the Government's motion is seriously, if not completely, lacking and, second, because the facts and materials which we presented to the trial court, far from being insubstantial, clearly contradict the basis for the change in the record requested by the Government.

We have already analyzed at length the alleged support for grant of the Government's motion which was relied on by the District Court in its "Findings, Conclusions and Order" dated February 5, 1971, in our Supplementary Memorandum. We do not intend to repeat that analysis here. It should be pointed out, however, in response to the Government's assertion (Brief, p. 6, fn. 6)[1/], that the claimed "central position" of the instruction at issue, suggested by the District Court (Conclusions, para. 1), is no guarantee that this portion of the court's instructions to the jury was any more carefully delivered than others. Moreover, if these particular instructions were delivered with special

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1/ Since we have not received the printed version of the Government's brief, our citations are necessarily to the pages of its typewritten brief.

attention and care, the court reporter would have had less reason to make the "errors" claimed by the Government -- or to have made the numerous additional departures from the prepared instructions with which the Government appears to have no concern. (See Appendix A to our Supplementary Memorandum.)

The Government also claims that the judicial notice concerning other problems regarding the court reporter's transcripts in other cases (Findings, para. 5) was properly taken by the District Court. The Government, however, does not identify at all or discuss the significance, relevancy or accuracy of these so-called "problems" to the circumstances of this case.[2/] Consequently, we submit that our analysis of the propriety of the District Court's assertion of judicial notice remains unchallenged.

In attacking the facts and materials which we presented to the District Court, the Government claims that the affidavit of the court reporter at the trial below is insubstantial and "not in any way rebut[s] the prosecutor's affidavit." (Brief, p. 4) According to the Government, the court reporter's affidavit, insofar as it refers to her original shorthand notes of the trial proceeding and to the use of a tape recording

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2/ In this connection, we submit that Government's remarks concerning the so-called "problems" referred to by the District Court (Brief, p. 6, fn. 5) constitute a speculative and possibly even misleading contribution to the record before this court.

to insure the accuracy of her transcription,must be totally discredited because the tape recording of the trial proceeding no longer exists.[3/] We should point out, however, that there is no requirement that such tapes be made or retained and that the validity of the entire transcript of this proceeding rests ultimately on the certification of this same reporter; as far as we know, there are no existing tape recordings of any other part of these proceedings. The substantiality of the court reporter's sworn statements cannot be attacked without questioning the foundation of the entire record on appeal here.

The Government's position here apparently is dictated more by happenstance than any doubt about the accuracy of the court reporter's sworn statements. The Government initially relied upon the prosecutor's affidavit only because it stated that it had tried unsuccessfully to find the court reporter to get her to check her notes. (Motion to Correct Record, dated June 16, 1970, p. 1) Only when the court reporter had confirmed the accuracy of the original transcript in question did the Government seek to discredit her reliability as a court reporter.

3/ This is the first time that the Government has argued that the present unavailability of this tape recording should be of any decisional significance.

We must also observe that the affidavit of the prosecutor presented with the Government's motion to correct the record is certainly no more "substantial" than the court reporter's own affidavit. The prosecutor's bald statement in his affidavit that he could recall the precise words used by the trial court fourteen months after the fact suggests the possession of a truly remarkable memory, but a memory which is completely unsupported by any further evidence of what the jury heard, such as a tape recording of those proceedings, and is squarely contrary to the sworn recollection of the court reporter.[4/] As we stated to the District Court, defense counsel in the trial below advised undersigned counsel that he cannot recall the specific language at issue here. (Opposition to Motion to Correct Record, dated July 6, 1970, p. 2) We accept defense counsel's assertions as a natural and completely candid response and must assume that the District Court shared our doubts about the prosecutor's claims since it failed to make any reference to them in its decision.

4/ The Government now for the first time states that the prosecutor ". . . based his affidavit . . . on his trial notes" in addition to the court's prepared jury instructions and his personal recollections. (Brief, p. 4, fn. 2) Since these notes were mentioned neither in the prosecutor's affidavit nor in the District Court's "Findings, Conclusions and Order," we will not discuss them further since the District Court's order could not have been based upon the existence or content of those notes. We do think it wholly inappropriate that such an assertion should now be made for the first time without lodging such notes with this court or making them otherwise available for inspection by undersigned counsel for the appellant.

In view of the foregoing, we submit that our original assertion that the Government has failed totally to meet its burden of proof with regard to its motion, in the presence of a serious challenge, is now confirmed.

Argument

II

The Government's position with respect to our argument that the District Court should have ordered a hearing before a judge other than the trial judge in this case is (1) that no hearing was required and (2) that having filed no request for a hearing or for the trial judge to participate as a witness only at that hearing, we cannot now seek these procedural safeguards. We submit that the Government is wrong on both counts.

In urging affirmance of the District Court's ruling, the Government cites an essentially irrelevant line of cases which deal with motions for new trials on the basis of newly discovered evidence.[5/] In each case the reviewing court upheld the denial of the motion, thus protecting the finality of the challenged trial proceedings. As stated in United States v. Troche, 213 F. 2d 401, 403 (2d Cir. 1954), "[i]t is important for the orderly administration of criminal justice that the findings on conflicting evidence by the trial court on a motion for new trial based on newly discovered evidence should remain undisturbed except for the most extraordinary circumstances." We submit that the force of the cited

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5/ Calomeris v. United States, 95 U.S. App. D.C. 239, 240, 221 F. 2d 111, 112 (1955); Ewing v. United States, 77 U.S. App. D.C. 14, 19, 135 F. 2d 633 (1942), cert. denied, 318 U.S. 776 (1943); United States v. Troche, 213 F. 2d 401, 402 (2d Cir. 1954); United States v. On Lee, 201 F. 2d 722, 723 (2d Cir. 1953), cert. denied, 345 U.S. 936 (1953).

policy has relevance here, if at all, only insofar as it places a heavy burden on parties, such as the Government in this case, who seek to alter significantly a trial record which has been completed.

In relying upon the line of cases just mentioned, the Government takes the position that the procedural safeguards which we requested in our Supplementary Memorandum need not be granted in view of authority in the line of cases listed above permitting motions for new trials on the basis of newly discovered evidence to be decided upon affidavits and without hearings. (Brief, p. 7) This position, however, does not recognize the essential differences between the determination by the District Court here and the determinations by District Courts upon the substance of the factual matters asserted by the Government resulting in a change in the trial record on a point which we have argued is reversible error. A District Court ruling on a motion for new trial is principally conceived with the need for finality and the timeliness of the tendered motion, not the substance of assertions which may there be made. Nor, of course, is the court itself a prospective witness in the fact-finding proceeding requested. In addition, the court's action is merely preliminary to further fact-finding as part of a new trial in which full procedural safeguards would be accorded the parties,

if the motion is granted, and, without a grant of the motion, there can be no change in the facts already established. On the basis of these essential differences, the Government's reliance upon the line of cases dealing with motions for new trials is obviously misplaced.

The Government argues that since Rule 10(e) of the Federal Rules of Appellate Procedure and the above-cited case authority which it found interpreting that rule make no specific reference to the hearing requirement which we have asserted, the requirement must not exist. (Brief, p. 8) Since the Government has ignored the clearly relevant case authorities cited in our Supplementary Memorandum, we believe that no further argument on this matter is appropriate.

Apparently in tacit acceptance of the standards announced by this court in Downey v. United States, 67 App. D.C. 192, 91 F. 2d 223 (1937), the Government asserts that no hearing is now required because the trial court had supplied copies of its prepared jury instructions to trial counsel and because the District Court had not relied upon ". . . his mere unaided recollection of what he had told the jury" (Brief, p. 8) in ruling upon the Government's motion. We can find no reference in the record to counsel being supplied with copies of the trial judge's prepared jury instructions in the course of the trial and the Government

has pointed to none. Even if this material were furnished, we fail to see the relevancy of the argument. Moreover, as we have already noted, there were numerous and substantial departures from the prepared jury instructions by the trial judge, which substantially diminish the weight which might otherwise be accorded to them. (Supplementary Memorandum, pp. 15-16) The Government does not address itself to the propriety of the District Court's conclusion that, without the benefit of any independent recollection of the events at trial, it could find that the instructions were delivered precisely as prepared, or rely on the still undisclosed alleged "problems" with the transcripts of the court reporter in other cases. As we have previously argued, these contentions, of which the trial judge has unique knowledge, are matters very much at issue. The hearing requirement, particularly with respect to cross-examination of the trial judge, as set forth in Downey, op. cit. should not be lightly ignored.

Finally, the Government claims that our request for a hearing on its motion comes too late. The cases cited in support of this proposition deal exclusively with court rulings upon motions for new trials.[6/]

6/ United States v. Troche, supra., Lyles v. United States, 272 F.2d 910, 913 (5th Cir. 1959).

For reasons which we have already discussed, we cannot agree that these cases establish an appropriate standard for the court's actions on the Government's motion here. In this connection, we should add that our opposition to the Government's motion in the District Court was taken on the basis of the Government's assertion that while it had attempted to have the court reporter check her transcript, it was unable to locate her. Since the Government had itself thus established the importance of her testimony, we filed her affidavit assuming that it would be accorded full weight contradicting the prosecutor's affidavit. It was not until the District Court issued its "Findings, Conclusions and Order" that we learned of the so-called "problems" with the court reporter's transcripts in other cases. Consequently, we submit that we should not now be prejudiced because we did not anticipate the need for a hearing at the time our opposition to the Government's motion was filed.

has pointed to none. Even if this material were furnished, we fail to see the relevancy of the argument. Moreover, as we have already noted, there were numerous and substantial departures from the prepared jury instructions by the trial judge, which substantially diminish the weight which might otherwise be accorded to them. (Supplementary Memorandum, pp. 15-16) The Government does not address itself to the propriety of the District Court's conclusion that, without the benefit of any independent recollection of the events at trial, it could find that the instructions were delivered precisely as prepared, or rely on the still undisclosed alleged "problems" with the transcripts of the court reporter in other cases. As we have previously argued, these contentions, of which the trial judge has unique knowledge, are matters very much at issue. The hearing requirement, particularly with respect to cross-examination of the trial judge, as set forth in Downey, op. cit. should not be lightly ignored.

Finally, the Government claims that our request for a hearing on its motion comes too late. The cases cited in support of this proposition deal exclusively with court rulings upon motions for new trials. 6/

6/ United States v. Troche, supra., Lyles v. United States, 272 F.2d 910, 913 (5th Cir. 1959).

For reasons which we have already discussed, we cannot agree that these cases establish an appropriate standard for the court's actions on the Government's motion here. In this connection, we should add that our opposition to the Government's motion in the District Court was taken on the basis of the Government's assertion that while it had attempted to have the court reporter check her transcript, it was unable to locate her. Since the Government had itself thus established the importance of her testimony, we filed her affidavit assuming that it would be accorded full weight contradicting the prosecutor's affidavit. It was not until the District Court issued its "Findings, Conclusions and Order" that we learned of the so-called "problems" with the court reporter's transcripts in other cases. Consequently, we submit that we should not now be prejudiced because we did not anticipate the need for a hearing at the time our opposition to the Government's motion was filed.

Conclusion

For the foregoing reasons, we submit that the Government has presented no relevant authorities or other significant materials contradicting our original assertion that the District Court's "Findings, Conclusions and Order" must be reversed.

Respectfully submitted,

/s/ George Y. Wheeler
George Y. Wheeler

Koteen & Burt
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

Counsel for Appellant
(Appointed by this Court)

November 24, 1971

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing "Reply Brief for Appellant" have been sent by first class United States mail, postage prepaid, to the following on this 24th day of November, 1971:

John A. Terry, Esq.
Gregory C. Brady, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D. C. 20001

/s/ George Y. Wheeler
George Y. Wheeler

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D.C.B. McG. Chambers
12-6-71
(1)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1151

Crim. No. 1192-68

UNITED STATES OF AMERICA, Appellee

v.

FRANKLIN D. SHEPPARD, JR., Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

George Y. Wheeler

1000 Vermont Avenue, N. W.
Washington, D. C. 20005

Counsel for Appellant
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OTHER AUTHORITIES:

* Cases chiefly relied on are marked by asterisks.

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REPLY BRIEF FOR APPELLANT

Response to Brief for Appellee

Argument

I

The Government's assertion that the affidavit of the prosecutor in the trial below, the prepared jury instructions alluded to by the District Court (Findings, para. 4) and the alleged "problems" with the court reporter's transcripts in other cases of which the District Court took judicial notice (Findings, para. 5) should be sufficient to sustain the District Court's order correcting the record of the jury instructions concerning kidnapping is clearly in error.

Since the Government's brief does not contradict the authorities which we cited concerning the burden of proof applicable to its motion to correct the record, it has conceded that proof beyond a reasonable doubt is the appropriate standard. Viewed in this light, the Government's argument that it has sustained this burden is less than persuasive, as we previously discussed in our "Supplementary Memorandum for the Appellant," filed April 30, 1971.

The Government now seeks to strengthen the basis for the trial court's order granting the Government's motion by attempting to undercut the facts and materials which we presented to the District Court and by attempting to support the District Court's reliance on its

prepared jury instructions and the so-called "problems" with the court reporter's transcripts in other (unspecified) cases of which it purported, without prior notice to appellant, to take judicial notice. We submit that these efforts, however, are completely ineffectual, first, because affirmative support for a grant of the Government's motion is seriously, if not completely, lacking and, second, because the facts and materials which we presented to the trial court, far from being insubstantial, clearly contradict the basis for the change in the record requested by the Government.

We have already analyzed at length the alleged support for grant of the Government's motion which was relied on by the District Court in its "Findings, Conclusions and Order" dated February 5, 1971, in our Supplementary Memorandum. We do not intend to repeat that analysis here. It should be pointed out, however, in response to the Government's assertion (Brief, p. 6, fn. 6)[1/], that the claimed "central position" of the instruction at issue, suggested by the District Court (Conclusions, para. 1), is no guarantee that this portion of the court's instructions to the jury was any more carefully delivered than others. Moreover, if these particular instructions were delivered with special

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1/ Since we have not received the printed version of the Government's brief, our citations are necessarily to the pages of its typewritten brief.

attention and care, the court reporter would have had less reason to make the "errors" claimed by the Government -- or to have made the numerous additional departures from the prepared instructions with which the Government appears to have no concern. (See Appendix A to our Supplementary Memorandum.)

The Government also claims that the judicial notice concerning other problems regarding the court reporter's transcripts in other cases (Findings, para. 5) was properly taken by the District Court. The Government, however, does not identify at all or discuss the significance, relevancy or accuracy of these so-called "problems" to the circumstances of this case.[2/] Consequently, we submit that our analysis of the propriety of the District Court's assertion of judicial notice remains unchallenged.

In attacking the facts and materials which we presented to the District Court, the Government claims that the affidavit of the court reporter at the trial below is insubstantial and "not in any way rebut[s] the prosecutor's affidavit." (Brief, p. 4) According to the Government, the court reporter's affidavit, insofar as it refers to her original shorthand notes of the trial proceeding and to the use of a tape recording

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2/ In this connection, we submit that Government's remarks concerning the so-called "problems" referred to by the District Court (Brief, p. 6, fn. 5) constitute a speculative and possibly even misleading contribution to the record before this court.

to insure the accuracy of her transcription,must be totally discredited because the tape recording of the trial proceeding no longer exists.[3/] We should point out, however, that there is no requirement that such tapes be made or retained and that the validity of the entire transcript of this proceeding rests ultimately on the certification of this same reporter; as far as we know, there are no existing tape recordings of any other part of these proceedings. The substantiality of the court reporter's sworn statements cannot be attacked without questioning the foundation of the entire record on appeal here.

The Government's position here apparently is dictated more by happenstance than any doubt about the accuracy of the court reporter's sworn statements. The Government initially relied upon the prosecutor's affidavit only because it stated that it had tried unsuccessfully to find the court reporter to get her to check her notes. (Motion to Correct Record, dated June 16, 1970, p. 1) Only when the court reporter had confirmed the accuracy of the original transcript in question did the Government seek to discredit her reliability as a court reporter.

3/ This is the first time that the Government has argued that the present unavailability of this tape recording should be of any decisional significance.

We must also observe that the affidavit of the prosecutor presented with the Government's motion to correct the record is certainly no more "substantial" than the court reporter's own affidavit. The prosecutor's bald statement in his affidavit that he could recall the precise words used by the trial court fourteen months after the fact suggests the possession of a truly remarkable memory, but a memory which is completely unsupported by any further evidence of what the jury heard, such as a tape recording of those proceedings, and is squarely contrary to the sworn recollection of the court reporter.[4/] As we stated to the District Court, defense counsel in the trial below advised undersigned counsel that he cannot recall the specific language at issue here. (Opposition to Motion to Correct Record, dated July 6, 1970, p. 2) We accept defense counsel's assertions as a natural and completely candid response and must assume that the District Court shared our doubts about the prosecutor's claims since it failed to make any reference to them in its decision.

4/ The Government now for the first time states that the prosecutor ". . . based his affidavit . . . on his trial notes" in addition to the court's prepared jury instructions and his personal recollections. (Brief, p. 4, fn. 2) Since these notes were mentioned neither in the prosecutor's affidavit nor in the District Court's "Findings, Conclusions and Order," we will not discuss them further since the District Court's order could not have been based upon the existence or content of those notes. We do think it wholly inappropriate that such an assertion should now be made for the first time without lodging such notes with this court or making them otherwise available for inspection by undersigned counsel for the appellant.

In view of the foregoing, we submit that our original assertion that the Government has failed totally to meet its burden of proof with regard to its motion, in the presence of a serious challenge, is now confirmed.

Argument

II

The Government's position with respect to our argument that the District Court should have ordered a hearing before a judge other than the trial judge in this case is (1) that no hearing was required and (2) that having filed no request for a hearing or for the trial judge to participate as a witness only at that hearing, we cannot now seek these procedural safeguards. We submit that the Government is wrong on both counts.

In urging affirmance of the District Court's ruling, the Government cites an essentially irrelevant line of cases which deal with motions for new trials on the basis of newly discovered evidence.[5/] In each case the reviewing court upheld the denial of the motion, thus protecting the finality of the challenged trial proceedings. As stated in United States v. Troche, 213 F. 2d 401, 403 (2d Cir. 1954), "[i]t is important for the orderly administration of criminal justice that the findings on conflicting evidence by the trial court on a motion for new trial based on newly discovered evidence should remain undisturbed except for the most extraordinary circumstances." We submit that the force of the cited

5/ Calomeris v. United States, 95 U.S. App. D.C. 239, 240, 221 F. 2d 111, 112 (1955); Ewing v. United States, 77 U.S. App. D.C. 14, 19, 135 F. 2d 633 (1942), cert. denied, 318 U.S. 776 (1943); United States v. Troche, 213 F. 2d 401, 402 (2d Cir. 1954); United States v. On Lee, 201 F. 2d 722, 723 (2d Cir. 1953), cert. denied, 345 U.S. 936 (1953).

policy has relevance here, if at all, only insofar as it places a heavy burden on parties, such as the Government in this case, who seek to alter significantly a trial record which has been completed.

In relying upon the line of cases just mentioned, the Government takes the position that the procedural safeguards which we requested in our Supplementary Memorandum need not be granted in view of authority in the line of cases listed above permitting motions for new trials on the basis of newly discovered evidence to be decided upon affidavits and without hearings. (Brief, p. 7) This position, however, does not recognize the essential differences between the determination by the District Court here and the determinations by District Courts upon the substance of the factual matters asserted by the Government resulting in a change in the trial record on a point which we have argued is reversible error. A District Court ruling on a motion for new trial is principally conceived with the need for finality and the timeliness of the tendered motion, not the substance of assertions which may there be made. Nor, of course, is the court itself a prospective witness in the fact-finding proceeding requested. In addition, the court's action is merely preliminary to further fact-finding as part of a new trial in which full procedural safeguards would be accorded the parties,

if the motion is granted, and, without a grant of the motion, there can be no change in the facts already established. On the basis of these essential differences, the Government's reliance upon the line of cases dealing with motions for new trials is obviously misplaced.

The Government argues that since Rule 10(e) of the Federal Rules of Appellate Procedure and the above-cited case authority which it found interpreting that rule make no specific reference to the hearing requirement which we have asserted, the requirement must not exist. (Brief, p. 8) Since the Government has ignored the clearly relevant case authorities cited in our Supplementary Memorandum, we believe that no further argument on this matter is appropriate.

Apparently in tacit acceptance of the standards announced by this court in Downey v. United States, 67 App. D.C. 192, 91 F.2d 223 (1937), the Government asserts that no hearing is now required because the trial court had supplied copies of its prepared jury instructions to trial counsel and because the District Court had not relied upon ". . . his mere unaided recollection of what he had told the jury" (Brief, p. 8) in ruling upon the Government's motion. We can find no reference in the record to counsel being supplied with copies of the trial judge's prepared jury instructions in the course of the trial and the Government

has pointed to none. Even if this material were furnished, we fail to see the relevancy of the argument. Moreover, as we have already noted, there were numerous and substantial departures from the prepared jury instructions by the trial judge, which substantially diminish the weight which might otherwise be accorded to them. (Supplementary Memorandum, pp. 15-16) The Government does not address itself to the propriety of the District Court's conclusion that, without the benefit of any independent recollection of the events at trial, it could find that the instructions were delivered precisely as prepared, or rely on the still undisclosed alleged "problems" with the transcripts of the court reporter in other cases. As we have previously argued, these contentions, of which the trial judge has unique knowledge, are matters very much at issue. The hearing requirement, particularly with respect to cross-examination of the trial judge, as set forth in Downey, op. cit. should not be lightly ignored.

Finally, the Government claims that our request for a hearing on its motion comes too late. The cases cited in support of this proposition deal exclusively with court rulings upon motions for new trials.[6/]

6/ United States v. Troche, supra., Lyles v. United States, 272 F.2d 910, 913 (5th Cir. 1959).

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